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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:

CASH CLOUD, INC.,
dba COIN CLOUD,

Debtor.

Case No.: Case No. BK-S-23-10423-MKN

Chapter 11

**DEPOSITION DESIGNATION OF DANIEL
AYALA IN CONNECTION WITH
EVIDENTIARY HEARING ON MOTION
TO APPROVE SETTLEMENT
AGREEMENT WITH COLE KEPRO
INTERNATIONAL, LLC
PURSUANT TO FEDERAL RULE OF
BANKRUPTCY PROCEDURE 9019**

**Hearing Date: November 28, 2023
Hearing Time: 1:30 p.m.**

1 Christopher McAlary (“Mr. McAlary”) by and through his attorneys of record, Carlyon Cica
2 Chtd. and Diamond McCarthy LLP, hereby designates the following portions of deposition to be
3 submitted into evidence in connection with the Evidentiary Hearing set for November 28, 2023, at
4 1:30 p.m.

5 Christopher McAlary designates the following sworn testimony given by Daniel Ayala on
6 November 9, 2023. Pursuant to LR 7032(a), a full transcript of the testimony, including Reporter’s
7 certification, is attached hereto as Exhibit 1.

8 Page 7:

9 13 Q. Okay. I understand that you're an attorney?

10 14 A. I am.

11 Page 12:

12 19 Were you ever dealing, you, Mr. Ayala, ever

13 20 dealing directly with anyone on behalf of the

14 21 Committee regarding the 9019 motion?

15 22 No, I did not

16 24 I relied on my -- Fox Rothschild and the

17 25 financial advisors.

18 Page 13:

19 1 Q. Okay. Let's take a moment and let me ask

20 2 you what is your position with the Debtor?

21 3 A. I am an independent director.

22 4 Q. So how -- what are your duties as an

23 5 independent director to Cash Cloud while it is in

24 6 bankruptcy?

25 7 A. I mean, you and I both understand what a

26 8 director does. A director of a company has oversight

27 9 over general policy, and the folks who are the CEOs

28 10 and the operators do the things that need to be done.

1 11 So once -- Chris and I worked -- Chris
2 12 McAlary and I worked together, and my role was fairly
3 13 limited in the beginning because Chris owned the
4 14 company, had it, and whatnot. And then, when he
5 15 resigned from his position as director, I took on the
6 16 broader role of setting those policies and, you know,
7 17 hoping that folks execute them with the guidance of,
8 18 of course, the people who are executing the policies
9 19 and the attorneys and the financial advisors.

10 22 Does the buck stop with you when it comes to
11 23 decision making from the Debtor?

12 Page 14:

13 1 A. Yeah, I would think so. I would think
14 2 that, you know, when a decision needs to be made,
15 3 somebody -- the independent director needs to make
16 4 that decision, yes.

17 10 Q. And as you're sitting across the table from
18 11 me, I just want to confirm that you're ultimately the
19 12 person that gets to make the decisions for the Debtor,
20 13 right?

21 14 A. That's right.

22 15 Q. Okay.

23 16 A. As you said, with the advice of financial
24 17 advisors and counsel and everybody else. They make it
25 18 pretty easy, let's put it that way.

26 19 Q. Fair enough.

27 20 A. They do the research and they put the time
28 21 in, and so what you get is, right, a set of

22 information from which you can then make a decision.

Page 17:

17 Q. Correct. So my first question is, do you
18 understand that the litigation filed by Cash Cloud was
19 filed four months earlier than the litigation filed by
20 CKI?

21 A. I didn't. I was not aware of that, but I
22 accept your premise.

Page 18:

7 Q. All right. Let's focus on the Cash Cloud
8 Complaint, Exhibit 3. Have you read that Complaint
9 before?

10 A. No.
...

25 A. As I understood it, at least, there was a

Page 19:

1 strong claim the Debtor had against Cole Kepro. The
2 problem was collection.
...

14 Did the Debtor look into -- aside from the
15 collectability of damages, the likelihood or
16 probability

17 A. My understanding was that the damages would
18 be able to be established that Cole Kepro had, you
19 know, made mistakes -- and this is from Jimmerson.
20 Jimmerson, I believe, was handling this matter. And
21 so folks thought there was a strong likelihood that

22 you could establish damages. The big issue was
23 collection.

24 So let's say you go establish a million
25 dollars in damages. Are you going to be able to

Page 20:

1 collect on it? And the answer was no. Cole Kepro was
2 threatening or communicating that they would go into
3 bankruptcy. And Cole Kepro had a financial backer,
4 and that financial backer made it clear that -- and it
5 was an individual -- but made it clear that he was not
6 going to further fund Cole Kepro's issues and so --

7 Q. If I name a couple of names, can you tell me
8 if one of those people was the individual we were
9 thinking of?

10 A. I couldn't, no.

11 Q. Okay. You don't know who it is?

12 A. That's right.

13 Q. What about Paul Cook?

14 A. Don't recognize the name.

15 Q. Okay. And I believe the other man's name --
16 last name is Gaffney?

17 A. Don't recognize that name, either.

Page 21:

4 You used the name Jimmerson. Is that the
5 attorney who was representing Cash Cloud and the
6 litigation against Cole Kepro?

7 A. That's right.

10 Q. My understanding is that he's been recently

1 11 terminated?

2 12 A. Okay. And that could be the case. If

3 13 that's the case, I don't know it.

4 17 Q. It is my understanding from word of mouth,

5 18 but you don't know anything about that?

6 19 A. That's right.

7 Page 22:

8 2 A. No, because we had filed the motion for

9 3 joint settlement, right? There was a resolution to

10 4 it. Why would you keep the guy on and have him

11 5 continue doing things and incurring bills, right? I

12 6 mean, in a bankruptcy you're trying to preserve the

13 7 assets of the estate as much as possible.

14 8 So it doesn't strike me as odd or -- it

15 9 would be the natural course. It doesn't strike me as

16 10 something I would need to be consulted on.

17 Page 23:

18 10 Q. (By Mr. Strother) Do you know who on behalf

19 11 of the Debtor would have made the decision, since it

20 12 wasn't you, to terminate the attorney representing

21 13 Cash Cloud in the litigation brought against Cole

22 14 Kepro?

23 ...

24 17 A. The direct answer is no. But I could give

25 18 you an idea, which would be my counsel, Fox

26 19 Rothschild, and the financial advisors that we have

27 20 who would have looked at the situation and said --

28 21 again, I don't, as an independent director, don't need

22 to be involved in every detail of decisions. But I
23 certainly approve of the idea that, we have a
24 settlement, we're going to court and getting that
25 resolved, and so people -- financial advisors and Fox

Page 24:

1 Rothschild are executing on those decisions and, you
2 know, back them up.

3 Q. ... A moment ago
4 you testified that it appeared that there was a strong
5 likelihood of establishing damages, and then the
6 paraphrase, but the problem -- the issue was
7 collectability?

8 A. That's right.

9 Q. Is that accurate?

10 A. Yes.

11 ...The
12 claims against Cole Kepro were an asset -- or are an
13 asset of the Debtor?

14 A. Absolutely.

15 Q. And that asset has some value?

16 A. That's the question.

17 Q. Well, right now the Debtor is asking the
18 Court to approve a 9019 motion where the Debtor would
19 get 850,000. So I think everyone should agree, right,
20 that it has at least that value?

21 A. Sure.

22 ...

23 ...has the Debtor

1 Page 28:

2 2 I go back to Province, that's the
3 3 financial advisor for the Debtor. Province did that
4 4 valuation, did that analysis, and came to the
5 5 conclusion that that \$850,000 was a good valuation for
6 6 the asset. I mean, that's all I can rely on.
7 ...
8 9 ...did Province come to the conclusion
9 10 about 850- separate and apart from the conversation
10 11 going on with Cole Kepro, or was Province asked by the
11 12 Debtor to opine on whether 850- was a good price?
12 ...

13 15 ...My recollection is the
14 16 Debtor had a set of assets, right, that it had to
15 17 liquidate for purposes of paying off, you know, and
16 18 dealing with the estate, right? And this was one of
17 19 those assets.

18 20 The Debtor went to -- my understanding is --
19 21 a broad range of potential purchasers for this asset
20 22 and got the response they got and distilled it all
21 23 down. And there were, you know -- it's nice when you
22 24 can say, you know, apples are apples and oranges are
23 25 oranges. ...

24 Page 29:

25 1 and different terms and different -- right? I mean,
26 2 you had a lot different things to deal with.
27 3 And so what they concluded after all of
28 4 their analysis and all of their work was that this was

1 5 the best situation for the Debtor to collect money for

2 6 this asset at value.

3 ...

4 11 Before any conversations were had with Cole

5 12 Kepro about Cole Kepro buying the litigation against

6 13 itself, did the Debtor, through its professionals,

7 14 place or try to place a value on the litigation

8 15 against Cole Kepro?

9 16 A. I don't know the answer to that.

10 Page 30:

11 16 But yeah, I mean, I got to say this

12 17 bankruptcy thing is, you know, it's interesting when

13 18 you can buy your own litigation, right?

14 19 Q. Very aptly put.

15 20 Do you have significant bankruptcy

16 21 experience?

17 22 A. Not personally, so that's a good thing.

18 23 Q. Yeah, sure. I'll drink to that.

19 24 A. But, yeah, I mean, enough to get me in

20 25 trouble.

21 Page 31:

22 18 ...Are you aware that Mr. McAlary

23 19 is objecting to the 9019 motion?

24 20 A. Yes.

25 21 Q. Okay. Are you familiar with the reasons

26 22 that he's objecting, his stated reasons?

27 23 A. Other than the only familiarity I have is

28 24 that he thinks his offer is better than the one put in

1 25 front of the joint settlement.

2 Page 32:

3 1 Q. Okay. Are you aware that Mr. McAlary has

4 2 complained about having Cole Kepro act as a committee

5 3 member and specifically the co-chair of the --

6 4 A. Yes.

7 5 Q. -- UCC? Okay.

8 6 A. Absolutely. I'd be jumping up and down

9 7 myself.

10 8 Q. So the reason I'm asking if you're aware of

11 9 those things so that you'll understand why I'm asking

12 10 the following questions, because you use "good faith"

13 11 and "arm's length."

14 12 I guess -- let me start with the other part

15 13 of that sentence, which is "after months." Do you

16 14 know when Cole Kepro and the Debtor first began

17 15 talking about resolving the matters among themselves?

18 16 A. I couldn't give you a date, no. The answer

19 17 is no, I can't give you a date.

20 Page 34:

21 2 Q. Do you know when the \$850,000 figure was

22 3 first announced in open court?

23 4 A. I don't know that. I remember it was at

24 5 California Pizza Chicken. I was sitting and having a

25 6 conversation with counsel for the Unsecured Creditors

26 7 Committee -- there was other people on the call. I

27 8 don't remember everybody on the call, but that is my

28 9 recollection of it, and it would have been sometime in

1 10 the summer of 2023 when this was sort of coming to

2 11 fruition, this deal was coming to fruition.

3 ...

4 14 The deal proposed in the 9019 motion is

5 15 ultimately a deal between the Debtor and Cole Kepro,

6 16 correct?

7 17 A. Yes.

8 18 Q. Who was negotiating on the Debtor's behalf

9 19 with Cole Kepro?

10 20 A. It would have been Fox.

11 Page 36:

12 4 ... You testified that the Fox people

13 5 were the ones acting on the Debtor's behalf while

14 6 negotiating the 9019.

15 7 A. Not accurate.

16 ...

17 9 A. Not accurate. So keep in mind that my

18 10 understanding at the time was that this set of funds

19 11 was going to go to the Unsecured Creditors Committee.

20 12 So they had a major role in pushing, deciding,

21 13 negotiating, et cetera.

22 14 So while our folks, you know, on behalf of

23 15 the Debtor were involved, there was nothing -- my

24 16 understanding was the Debtor wasn't getting anything

25 17 out of this. This was not going to be something

26 18 that -- it was all going to go -- it was the

27 19 interested party. The Unsecured Creditors Committee

28 20 was the interested party in this thing, right? They

21 were the ones who were going to get the money that was
going to come from this.

And so, you know, they were driving the
discussion and the negotiation. And we, of course,
you know, had our responsibilities. I, as an

Page 37:

1 independent director -- Fox is advising me and
2 Province is -- my financial advisors had, you know,
3 everybody had their role and did, I believe, play
4 their role. But ultimately, the Unsecured Creditors
5 Committee was a big driver. And given that -- again,
6 without going into what the detailed advice I received
7 was, I mean, given that it was -- it was a situation
8 where they had a lot of voice. And we listened to
9 them.

Q. It sounds like you're telling me that when
it came to negotiating between Cole Kepro and the
Debtor that the Committee was basically in the
driver's seat for those negotiations?

...

A. I wouldn't say that.

...

Q. (By Ms. Miller) But you said they were
driving the process?

A. I did say that. That's exactly what I said.

They were driving the process. We weren't, you know,
asleep at the wheel. We were paying attention to what
our responsibilities were, and I think -- you know, I

1 23 think I got the right input and advice, but yes, I

2 24 said the words I said.

3 Page 38:

4 12 Q. All right. I was just asking you about who

5 13 was participating in the negotiations between Cole

6 14 Kepro and the Debtor as it pertains to the deal that's

7 15 ultimately proposed in the 9019 motion.

8 16 A. Yes. And just to clarify so we can put it

9 17 on the record, it was Fox, it was Province, it was the

10 18 Unsecured Creditors Committee, it was their counsel.

11 ...

12 20 Q. Do you know who was communicating to Cole

13 21 Kepro?

14 22 A. The answer to that question is no,...

15 25 ...I would be copied on emails from and to the

16 Page 39:

17 1 Unsecured Creditors Committee's lawyers, to our

18 2 lawyers, from our lawyers back to Cole Kepro....

19 7 Q. Okay. Well, with regard to the Committee

20 8 driving the negotiations, I think that you testified

21 9 that from where you sat the Committee was going to end

22 10 up getting the funds ultimately anyway?

23 11 A. That's right. Yeah. That was my view. My

24 12 view was -- and that was, I think, everybody's view.

25 13 You know, that money was going to them. I may -- I

26 14 have opinions. I'm a lawyer. You can imagine I have

27 15 opinions. But I just didn't feel like I needed to

28 16 express strong opinions on the thing.

1 17 If somebody asked, I gave mine, with the
2 18 information I got from counsel and the financial
3 19 advisors, and I would give my opinion. And so I feel
4 20 I was heard. Don't get me wrong. I don't think I
5 21 wasn't heard on anything, but I said what I said.
6 22 Q. Given what you know about the Debtor's
7 23 financial status while it's here in bankruptcy, would
8 24 you agree that actually it's more likely that the
9 25 admin claims would get paid before the unsecured

10 Page 40:

11 1 creditors would get paid?

12 ...

13 3 A. I don't know the answer.

14 ...

15 5 A. I don't know the answer to that one. We all
16 6 know that the admin claims are given preference.

17 7 Q. Okay.

18 8 A. I mean, that's not rocket science in
19 9 bankruptcy.

20 ...

21 24 A. The answer is that Cole Kepro, being a
22 25 driver of the -- or being a major role player on the

23 Page 41:

24 1 Unsecured Creditors Committee, as well as getting this
25 2 transaction, this joint motion done, was shocking, to
26 3 say the least, right? But as you know, you can be
27 4 shocked in bankruptcy.

28 ...

1 18 Q. (By Mr. Strother) What's your understanding
2 19 of the relevance of Cole Kepro's insurance policy
3 20 that's referenced in the 9019 motion and its
4 21 attachment?

5 22 A. So it's all components of a deal, right?

6 23 That's all it was. And so you -- you had a priority
7 24 claim from Fifth Third Bank, right, that had senior
8 25 position. They're going to come to the table and

9 Page 42:

10 1 play, and you had the insurance policy that was out
11 2 there that needed to be triggered. You had a payment,
12 3 you know, that was going to come to the estate -- I
13 4 mean, they're just all components of the deal, right?
14 5 And so how all of that came together, I
15 6 expect was done in a lawyerly fashion and -- you know,
16 7 as with any settlement, somebody's got to give up a
17 8 little something. I mean, Fifth Third, as I
18 9 understand it, is not getting paid their full boat on
19 10 what they're owed by, you know, Cole Kepro. We're
20 11 getting what we're getting out of the transaction.

21 ...

22 16 Q. Do you know what coverage Cole Kepro has
23 17 under that policy?

24 18 A. No.

25 19 Q. Meaning, is it a \$1 million, \$10 million,
26 20 something else?

27 21 A. 10 million sounds more right.

28 22 Q. Okay. I'll represent, again, to you that

1 23 yesterday Mr. Cook testified that should the 9019 be
2 24 approved and insurance company pay out on the bad debt
3 25 insurance policy claim, that Fifth Third Bank would be

4 Page 43:

5 1 made whole. Does that surprise you?

6 2 A. I mean, almost whole. They had a big

7 3 number. I mean, minus the 850-, we get the 850-,

8 4 that's -- I mean, you want to call that whole? I

9 5 mean, I don't know. It's 10 percent, right? A

10 6 10 percent haircut is my understanding of what Fifth

11 7 Third was going to take. If they come out whole, then

12 8 I don't know that.

13 ...

14 12 Q. You haven't seen the policy?

15 13 A. No.

16 14 Q. Does the Debtor have any position on the

17 15 likelihood of the insurance company paying out on that

18 16 claim?

19 17 A. I believe that the -- that's a key component

20 18 of it, is that the insurance company is going to pay

21 19 out. I believe the insurance company is -- I believe

22 20 that's a done deal.

23 21 Q. Why do you believe that?

24 22 A. That's what I was told.

25 ...

26 24 ... can you tell me who

27 25 told you that?

28 Page 44:

1 3 A. No, I can't tell you who told it, because it

2 4 would invade the attorney-client privilege.

3 ...

4 6 A. But, again, just on the broader scale, that

5 7 was a key component, that policy was going to pay,

6 8 that's where the money was going to come from.

7 9 Q. Have you seen any communications from the

8 10 insurance company that suggests that the insurance

9 11 company is going to pay the claim?

10 12 A. No.

11 13 Q. Have you seen anything that suggests the

12 14 insurance company knows about this aspect of the

13 15 transaction that's being proposed by the 9019 motion?

14 16 A. I haven't seen any communications with the

15 17 insurance company.

16 18 Q. Okay.

17 19 A. Cole Kepro's insurance company, I've seen

18 20 nothing.

19 21 Q. Okay.

20 22 A. I don't know anything about that insurance

21 23 company, what their position is on things, and

22 24 whatnot.

23 Page 45:

24 8 So the 9019 proposes a transaction where,

25 9 first of all, the Debtor and Cole Kepro have competing

26 10 ideas. The Debtor is saying, Cole Kepro sold me

27 11 defective equipment. Cole Kepro is saying, No, I

28 12 didn't; you owe me a lot of money.

1 13 Do you agree with me so far?

2 14 A. Yeah.

3 15 Q. But as part of that transaction, both of

4 16 those entities get something, right? Meaning, the

5 17 Debtor gets \$850,000. Cole Kepro, ostensibly, gets

6 18 paid out on an insurance policy, right?

7 ...

8 20 Q. (By Mr. Strother) So far so good? Meaning,

9 21 you agree with the way I'm summarizing it so far.

10 22 A. I accept what you said.

11 23 Q. And the way that both of those entities get

12 24 money in their pocket is because the insurance company

13 25 is told by Cole Kepro that the Debtor says that Cole

14 Page 46:

15 1 Kepro has a good claim, right?

16 ...

17 3 A. Okay.

18 4 Q. (By Mr. Strother) But in exchange for the

19 5 Debtor saying Cole Kepro has a good claim, the Debtor

20 6 is getting \$850,000 of the insurance company's money,

21 7 right?

22 ...

23 9 Q. (By Mr. Strother) You're nodding your head.

24 10 You agree with me?

25 11 A. Yes, that would seem to be part of the

26 12 transaction.

27 13 Q. How is that situation different than two

28 14 people getting into a car wreck with one person

1 15 jumping out of the car and saying, This is totally my
2 16 fault, I was looking at my iPhone, I was doing TikTok,
3 17 I'm sorry I rear-ended you, but listen, I have amazing
4 18 insurance. If you'll just say it's your fault, I'll
5 19 be able to get an uninsured insurance claim and I'll
6 20 share it with you.

7 Page 47:

8 3 A. I'm not going to engage in that exercise.

9 4 And I will say that you and I, as you've been

10 5 practicing, I'm sure for --

11 6 Q. Twenty-five years, maybe twenty-six.

12 7 A. Twenty-five years. And deals get done how

13 8 deals get done. Exchanges are made, right? And so,

14 9 you know, while I understand it may be to your benefit

15 10 to make it sound shocking, that -- you know, with your

16 11 car example, you know, I'm not going to engage in it.

17 12 To me, it's a simple business deal. It's a

18 13 business transaction using the assets and tools that

19 14 people have to use to come to a resolution....

20 22 Q. Wouldn't you agree, though, that evaluating

21 23 the likelihood that the insurance company is going to

22 24 pay out on that claim is important from the Debtor's

23 25 perspective?

24 Page 48:

25 1 A. Yes, I would agree.

26 ...

27 18 Q. Do you think the Debtor is living in that

28 19 world, though, that there's 100 percent certainty that

1 20 the insurance company is going to pay out on that
2 21 claim?

3 ...

4 24 A. I believe that the relevant people -- that
5 25 would be Fox, that would be our financial advisors --

6 Page 49:

7 1 have evaluated that scenario and concluded that
8 2 there's a high probability of it getting done;
9 3 otherwise, we wouldn't have brought this motion.

10 4 Q. (By Mr. Strother) If the Debtor's advisors
11 5 had not actually done that level of diligence, would
12 6 you be concerned?

13 7 A. Sure.

14 ...

15 9 Q. (By Mr. Strother) I'll represent to you
16 10 that I deposed Mr. James in this room on October 24th,
17 11 and I'll read to you from his deposition transcript to
18 12 see if it makes a difference to you.

19 13 On Page 56, Line 5, I asked: "Have you
20 14 received any information from Cole Kepro regarding the
21 15 status of the insurance claim?"

22 16 Mr. James says, "Not to my knowledge, no.
23 17 I've received the policy."

24 18 "QUESTION: What did you do with the policy?

25 19 "ANSWER: I reviewed the policy.

26 Page 53:

27 5 Q. (By Mr. Strother) So what happens to this
28 6 deal if it's approved and the insurance company

1 7 doesn't pay?

2 ...

3 9 A. We get, I believe, an unsecured claim for an

4 10 additional 850,000.

5 11 Q. (By Mr. Strother) Which would be junior

6 12 to -- 100 percent junior to Fifth Third, right?

7 13 A. Yeah, I mean, I'm going to have to accept

8 14 you as the bankruptcy expert. I'm going to have to

9 15 accept what you say as what the rules are. But, like

10 16 I said, just enough to get into trouble. So I

11 17 couldn't answer that question for you as to how the

12 18 law would apply to Fifth Third in a Cole Kepro

13 19 bankruptcy.

14 ...

15 25 Q. What I am trying to get you, on behalf of

16 Page 54:

17 1 the Debtor, to concede, number one, is that there's a

18 2 chance that the insurance company will not pay out on

19 3 the claim.

20 4 A. Sure.

21 ...

22 6 A. I concede that. Whatever, however small

23 7 that chance may be, one percent. I mean, it's not

24 8 done, right? Until it's done, it's not done, so...

25 9 Q. And you picked one percent for illustration

26 10 purposes, correct? You don't know what the chance is

27 11 right now?

28 12 A. Correct.

1 13 Q. Okay. And as you sit here today, you don't
2 14 know what the insurance company knows at all, right?
3 15 A. I have no -- I can tell you that I have had
4 16 no communications with the insurance company. I have
5 17 relied on Province and Fox for their assessments of
6 18 that policy.
7 19 Q. Do you know whether anyone at Fox has spoken
8 20 to the insurance company?

9 ...

10 22 A. I don't.

11 Page 55:

12 1 You already told me that you couldn't -- by
13 2 phone call, email, participant -- tell me how the
14 3 negotiations unfolded between end of June and some
15 4 point late summer, but can you tell me who proposed
16 5 the general structure of the deal?
17 6 And by "general structure" I mean, the Cole
18 7 Kepro claim as allowed by the Debtor, money goes from
19 8 Cole Kepro to the Debtor, and Cole Kepro gets money
20 9 from the insurer to secure that promise to pay that
21 10 sum from Cole Kepro to Cash Cloud, the Debtor?

22 ...

23 22 Q. Who generated, conceptually, the structure
24 23 of the agreement?

25 24 A. Okay. The answer is I don't know. I don't
26 25 know the answer to that question. I know that -- what

27 Page 56:

28 1 I can tell you is that I was on a telephone

1 2 conference, where I first heard about this, with the
2 3 unsecured creditors' counsel, with my counsel, with my
3 4 financial advisor.

4 5 So nobody in that conversation took credit
5 6 for or authorship for the deal. It was, Dan, we need
6 7 you to get on this call. We went your, you know,
7 8 opinions on this, and this is -- these are the things
8 9 we're looking at, these are the things we need to
9 10 weigh.

10 11 I think Chris McAlary had made a proposal at
11 12 some point in that -- I mean, I remember that, that
12 13 was always there -- his proposal of buying the
13 14 litigation. It wasn't just Cole Kepro.
14 15 And that's the other thing you have to
15 16 incorporate when you're evaluating these things is, it
16 17 wasn't apples to apples. He wasn't just saying Cole
17 18 Kepro, right, he's saying, I want all the litigation.
18 19 And so evaluating that versus what other step was on
19 20 the table.

20 Page 57:

21 7 Q. You declare there that, "It is likely that
22 8 CKI would be forced to commence its own bankruptcy
23 9 proceedings." Correct?

24 10 A. That's what it says.

25 11 Q. Okay. Why do you say that in the
26 12 Declaration?

27 13 A. I was told that.

28 ///

1 Page 58:

2 24 Q. Okay. If Cole Kepro's financial situation
3 25 was bad but now it's better such that Mr. Cook is

4 Page 59:

5 1 testifying under oath, number one, that Cole Kepro was
6 2 not likely to declare bankruptcy, and number two -- he
7 3 also testified to this -- that Cole Kepro has never
8 4 threatened bankruptcy and is not preparing for
9 5 bankruptcy, shouldn't that change the Debtor's
10 6 evaluation on the collectability of a judgment from
11 7 Cole Kepro?

12 ...

13 10 A. Yeah, I mean, if somebody is saying they're
14 11 bankrupt, and you have information that would verify
15 12 that, which we had six months ago, right, from, you
16 13 know, people speaking to each other and who have
17 14 information -- I mean, I have no reason to believe Dan
18 15 Moses would lie or mislead me. I don't believe -- and
19 16 I don't believe whoever he spoke to lied or misled
20 17 him. Maybe people take positions, and -- you know, we
21 18 all understand that.

22 19 But the bottom line is, if Cole Kepro is not
23 20 in a bankruptcy scenario, if their financial strength
24 21 is, you know, better and stronger -- and, again, what
25 22 does that mean, right? I mean, real strength, right?
26 23 Certainly you would reevaluate that collectability
27 24 component of your analysis, right?
28 25 If you think you can't collect, you know,

1 Page 60:

2 1 10 million bucks, that's different. I don't know that
3 2 it would be different at 3 million, 850- versus
4 3 3 million. I mean, you know what you got to do to go
5 4 through that. You got to pay a lot of lawyers' fees,
6 5 and I just don't -- again, I guess all I'm saying is,
7 6 if you tell me there are new facts, then of course I
8 7 would consider new facts.
9 8 I don't know that I would change my view or
10 9 opinion or conclusions on what deal I approached or
11 10 what have you. But I would say that I would be stupid
12 11 not to consider new facts. I would consider myself
13 12 stupid. So I would consider new facts if they were in
14 13 play.
15 ...
16 21 ... What you're
17 22 focusing on is one component, which is
18 23 collectability --
19 24 Q. Right.
20 25 A. -- which I have acknowledged to you was a

21 Page 61:

22 1 major factor, at least in my analysis, and after
23 2 getting everybody's advice, you know, I did not assess
24 3 collectability myself. I don't have the data or the
25 4 information. I trusted the people who did have the
26 5 data and information and say, It's uncollectible.
27 6 Okay.
28 7 If I had information that said that you

1 8 could collect, you know, a big chunk of this money,
2 9 then I would obviously have to consider that, right?
3 10 And when you asked me would I consider his
4 11 deposition -- yeah, you know, that doesn't mean a lot
5 12 to me, what his deposition testimony is.

6 ...

7 Page 62:

8 22 Have you been made aware of any of
9 23 Mr. Cook's testimony?

10 24 A. No.

11 25 Q. Okay. Would it surprise you to learn that

12 Page 63:

13 1 Cole Kepro -- he testified that Cole Kepro has paid
14 2 off \$10 million of loans since the bankruptcy?

15 ...

16 5 Q. (By Mr. Smother) Since Cash Cloud's
17 6 bankruptcy.

18 7 A. I didn't know that.

19 8 Q. Given what I'm representing to you as
20 9 Mr. Cook's testimony, and given your testimony that
21 10 you're privy to what Cole Kepro's financial status was
22 11 six months ago, would you agree that it would behoove
23 12 the Debtor and the Debtor's professionals to
24 13 reevaluate with fresh eyes and fresh information what
25 14 Cole Kepro's current financial status is to find out
26 15 if the deal proposed in the 9019 motion actually is in
27 16 the Debtor's best interest?

28 ...

1 18 A. I don't know about that, okay? You cut a
2 19 deal based on certain things that existed at the time
3 20 of the deal,...

4 Page 64:

5 17 So what you're saying is, do I want to go
6 18 redo the deal now that there's -- yeah, it would be
7 19 great to go redo the deal.
8 ...

9 24 Q. And, in fact, you have a Declaration in
10 25 front of you right now --

11 Page 65:

12 1 A. Right.
13 2 Q. -- that says Cole Kepro is likely to declare
14 3 bankruptcy, and I'm telling you the CEO testified
15 4 under oath yesterday that they're not likely to
16 5 declare bankruptcy.
17 6 How are you going to support the 9019 motion
18 7 with a Declaration based on old information?
19 ...

20 9 A. It was true at the time it was --

21 10 MS. MILLER: Object to form.

22 11 Q. (By Mr. Smother) Well, did you have a sworn
23 12 statement from Mr. Cook that it was true?

24 13 A. No.

25 14 Q. You heard through the grapevine that someone
26 15 was making threats --

27 ...

28 17 Q. (By Mr. Smother) -- right?

1 18 A. Of course.

2 Page 69:

3 1 Q. ... Are you familiar

4 2 with the term in the proposed settlement agreement

5 3 that has the Debtor releasing all claims upon court

6 4 approval as opposed to when the promissory note is

7 5 actually paid?

8 6 A. I do recollect that.

9 7 Q. Does that give you pause?

10 8 A. Yeah, I mean –

11 ...

12 16 ...it

13 17 wasn't, you know, it wasn't the perfect deal. But it

14 18 was the best deal we could get at the time for the

15 19 asset given the circumstances that were in place.

16 ...

17 25 Q. (By Mr. Strother) What was the rationale

18 Page 70:

19 1 for giving that?

20 ...

21 4 Q. (By Mr. Strother) The release to Cole Kepro

22 5 the moment Judge Nakagawa signs the order as opposed

23 6 to after actually receiving payment from the

24 7 promissory note?

25 ...

26 17 The deal was presented to me as is with all

27 18 terms. So I looked at all of those things and made an

28 19 evaluation and took the advice of folks who said this

1 20 is -- this is the best we can get.

2 21 So we didn't go down the list and say, Oh, I

3 22 gave this for that, we gave this for that. That

4 23 wasn't the conversation that I had.

5 24 Q. (By Mr. Strother) Would you know the

6 25 rationale for why the director agreed to release those

7 Page 71:

8 1 claims upon signing of the order as opposed to later?

9 2 A. I don't have any recollection of having that

10 3 conversation.

11 Page 72:

12 7 Q. So I'm wondering why, instead of comparing

13 8 the settlement to the embroiled litigation that's

14 9 going to be time-consuming, why you're not comparing

15 10 this settlement with the proposal made by McAlary,

16 11 because there's another way out of the litigation,

17 12 right? And that's McAlary's offer.

18 ...

19 23 A. That would have been one of the paths,

20 24 right? You could sell it to McAlary, right?...

21 Page 73:

22 2 ... So one of McAlary's provisions

23 3 was, you couldn't do this analysis that you want to

24 4 do, which is, Hey, we just sell it to Chris, right,

25 5 because you're selling to other pieces of litigation

26 6 to him, right?...

27 17 ... I took the advice of the

28 18 lawyers and the financial advisors on which was the

1 19 better deal, okay?

2 Page 75:

3 9 Is it your testimony that Mr. McAlary has

4 10 never offered to buy the Cole Kepro litigation, that

5 11 is the litigation that Cash Cloud has against Cole

6 12 Kepro, he's never offered to buy that independent from

7 13 the other litigation claims that Cash Cloud has?

8 ...

9 15 A. I don't recall.

10 ...

11 17 A. I mean, if there's an independent offer -- I

12 18 mean, he and I had had conversations about this as it

13 19 was ongoing, and so part of that, right, part of that

14 20 was -- like I said, Fox was talking to Cole Kepro,

15 21 Moses, the finance guys was talking to those guys, I

16 22 was talking to Chris. I don't know if Brett was

17 23 talking to Chris at the time -- that's Brett Axelrod

18 24 of Fox -- and who was doing what.

19 Page 76:

20 16 Q. My question was, is it your testimony that

21 17 Mr. McAlary never offered to buy the Cole Kepro

22 18 litigation independent from other litigation? And I'm

23 19 not sure I heard the answer. You may have -- it may

24 20 have been in there, but what is your testimony in that

25 21 regard?

26 22 A. The answer is I don't recall specifically,

27 23 but I know that he and I had conversations.

28 ...

1 25 ...I did

2 Page 77:

3 1 have conversations with him about the purchase of

4 2 these litigation claims and ways he could structure,

5 3 right --

6 4 I mean, that was the whole point of the

7 5 apples to apples thing. Chris and I talked about it.

8 6 I said, Look, this is your problem right now, you

9 7 know, is that you're saying this, and they want you to

10 8 say this. "They" being the financial advisors, et

11 9 cetera, et cetera.

12 10 And so we had those conversations. I

13 11 just -- the answer to your question is I don't recall

14 12 specifically if he did it or not.

15 ...

16 20 Q. (By Mr. Strother) Do you see that Exhibit 5

17 21 at the top, under the black box, is an email from Dawn

18 22 Cica to Brett Axelrod on July 20th, 2023?

19 23 A. Yeah.

20 Page 79:

21 9 Q. So would you agree with me that this is an

22 10 offer from an entity controlled by Mr. McAlary that

23 11 breaks out what his offer is with regard to the

24 12 various pieces of litigation?

25 13 A. Yes.

26 ...

27 18 Would you please turn to the last page of

28 19 Exhibit Number 5. Do you see the second-to-last

1 20 paragraph?

2 21 A. Yes.

3 Page 80:

4 12 Q. That is undeniably an offer from Mr. McAlary

5 13 to purchase the Cole Kepro litigation independent from

6 14 the other litigation, true?

7 15 A. Right. Says what it says.

8 Page 81:

9 2 Q. Do you see that the first page under the

10 3 black block is an email, again, from Ms. Cica to

11 4 Ms. Axelrod on August 2nd, 2023?

12 5 A. Yes.

13 6 Q. And the entirety of that email says, "Brett,

14 7 per Chris's discussion with Danny last night, here's a

15 8 purchase agreement for the three litigation matters."

16 9 A. Yes.

17 10 Q. Do you recall that conversation with Chris

18 11 on the evening of October 1st?

19 12 A. I recall having a conversation with him.

20 13 Q. I said October 1st. I'm sorry. Do you

21 14 understand that I meant August 1st?

22 15 A. Whatever the date was. I recall having a

23 16 conversation with him. As I mentioned earlier, I was

24 17 trying to discuss with him ways that he could clarify

25 18 his offer.

26 19 Q. Okay. And this is approximately ten or so

27 20 days after Exhibit 5 when Ms. Cica wrote the letter

28 21 that the Cole Kepro litigation could be purchased

1 22 standalone, correct?

2 23 A. Okay. I accept what you say.

3 24 Q. Do you recall telling Mr. McAlary on

4 25 August 1st that he should package the litigation offer

5 Page 82:

6 1 to be all -- package the purchase offer to be all

7 2 three pieces of litigation?

8 3 A. I don't recall that, no.

9 4 Q. If that's what Mr. McAlary testifies to,

10 5 would you disagree with him, or do you just not

11 6 recall?

12 7 A. I just don't recall what exactly we talked

13 8 about.

14 9 Q. Do you recall the Debtor's efforts to sell

15 10 the -- to settle the Bitacess and BitCoin Depot claims

16 11 between July 28th and August 1st?

17 12 A. No. I don't recall anything about that at

18 13 all.

19 Page 83:

20 21 On July 27th, Ms. Cica says to, among

21 22 others, Ms. Axelrod, "Brett, per our call and your

22 23 request, attached is the common interest agreement

23 24 referred to in the CC BR Holdco offer to purchase

24 25 litigation assets, which I transmitted to you the

25 ...

26 Page 84:

27 1 afternoon of July 20th after you requested a

28 2 stand-alone bid with regard to the Cole Kepro

1 3 litigation (as defined in the offer.)" Did I read

2 4 that correctly?

3 5 A. Yes.

4 6 Q. Do you see right above that Ms. Axelrod

5 7 responds one minute later and just says, "Thank you"?

6 8 A. Yep. I see it.

7 9 Q. Do you see that on the following day, right

8 10 above that, Ms. Cica says to Ms. Axelrod, "Brett, I

9 11 assume this is understood, but I want to confirm that

10 12 any sale of the litigation pursuant to the auction

11 13 will be at 363 sale not subject to clawback."

12 14 A. I see it.

13 15 Q. Do you see, then, Brett responds -- I'm

14 16 sorry. Ms. Axelrod responds an hour and a half later,

15 17 "Should have draft to you no later than Monday."

16 18 A. Okay.

17 19 Q. And do you see Ms. Cica responds within ten

18 20 minutes, "A draft of....?"

19 21 A. Yes, I see that.

20 22 Q. And do you see that Ms. Axelrod responds

21 23 three minutes later, "Private sale motion"?

22 24 A. Got it.

23 25 Q. First of all, do you agree that this

24 Page 85:

25 1 indicates that the Debtor had accepted that offer and

26 2 had instructed Ms. Cica how to prepare the documents

27 3 to document the sale?

28 ...

1 7 A. It says what it says. I don't disagree with
2 8 anything it says. It's all in writing. It speaks for
3 9 itself, so -- yeah, it says what it says.

4 Page 86:

5 1 Q. Well, you're the Debtor, and this is your
6 2 attorney, right?

7 3 A. That's right.

8 4 Q. So did she have the authority to have this
9 5 conversation with the counsel for Mr. McAlary?

10 6 A. Sure.

11 Page 87:

12 25 Q. Mr. Ayala, I show Exhibit 9 to you to merely

13 Page 88:

14 1 ask that you let me know if you agree that this shows
15 2 that the parties, the Debtor and Mr. McAlary, were
16 3 finalizing the motion and all of the supporting
17 4 documents for the deal that we've been discussing over
18 5 the previous few exhibits?

19 6 A. That's what it appears to show, yes.

20 ...

21 8 Q. (By Mr. Strother) Do you know what happened
22 9 next?

23 10 A. I don't recall.

24 ...

25 13 Is it true that after the Debtor provided
26 14 the proposed paperwork to counsel for Committee,
27 15 counsel for Committee indicated that it was going to
28 16 object to the proposed transaction?

1 ...

2 18 A. I do recall that, yeah, I do recall

3 Page 90:

4 8 Q. I am introducing Exhibit 10, and the sticker

5 9 will be in a very happy and pleasant place.

6 10 (Exhibit Number 10 was marked.)

7 11 Q. Okay. Exhibit 10 has been uploaded. Will

8 12 you let me know when you can see it?

9 13 A. I can see it.

10 14 Q. Okay. Do you agree that on Page 1 this an

11 15 email from Ms. Cica to Ms. Axelrod on August 21st?

12 16 A. Yes.

13 17 Q. And do you recall that the \$750,000 figure

14 18 was documented and document's dated August 4th,

15 19 correct?

16 20 A. Okay.

17 21 Q. Do you see that Ms. Cica writes, "Brett,

18 22 attached please find an updated offer by CC BR Holdco,

19 23 LLC, to purchase the estate's claims against Cole

20 24 Kepro for \$1 million and the estate's claims against

21 25 Bitaccess and BitCoin Depot for \$200,000 as well as the

22 Page 91:

23 1 payment of the arbitration deposit in Canada of

24 2 261,389.14, Canadian dollars"?

25 3 A. I see it.

26 4 Q. So would you agree with me that as of

27 5 August 21st Mr. McAlary had offered \$1 million for the

28 6 Cole Kepro litigation?

1 7 A. I see it, yes.

2 8 Q. And --

3 ...

4 10 Q. (By Mr. Strother) -- would you agree that

5 11 this being an updated offer, the concept that it was

6 12 meant to be received as standalone is manifest on the

7 13 face of these documents?

8 ...

9 16 A. It says what it says. The document speaks

10 17 for itself.

11 ...

12 24 Would you agree that the offer made on

13 25 August 21st is for an entire sum of approximately

14 Page 92:

15 1 \$1.4 million?

16 2 A. Well, it says, one million for the estate

17 3 claims, 200,000 for Bitaccess and BitCoin Depot, and

18 4 the Canadian deposit of 261,389.14.

19 ...

20 8 Q. Did you evaluate that offer?

21 9 A. Sure.

22 10 Q. What was -- what did that evaluation entail?

23 11 A. I don't recall the specifics of it. I do

24 12 recall that a big issue was the bankruptcy of Cole

25 13 Kepro. That was a big issue driving -- driving

26 14 discussions was, Hey, it's great, you can have all

27 15 this, you know, 10 percent extra and all these other

28 16 things, but if it's going to -- if Cole Kepro is going

1 17 to go BK, you know, you get nothing out of it.

2 18 Q. I'm not -- I'm sorry. The Debtor wouldn't

3 19 get nothing in that situation, right?

4 20 A. Correct.

5 21 Q. It would still get the \$1 million for the

6 22 Cole Kepro from Mr. McAlary.

7 23 A. That's right.

8 Page 94:

9 23 And so the idea that you're posing me the question of,

10 24 Hey, isn't a million better than 850,000? Yeah, the

11 25 answer to that question is yes.

12 Page 95:

13 1 Now, add in all the other components and

14 2 factors of the two different offers and they're not.

15 3 And so I took the advice of my counsel and the

16 4 financial advisors, who are much smarter than me, as

17 5 you've already learned in this deposition that we've

18 6 had today, there are people smarter than me who gave

19 7 me advice on what the evaluation was and -- you know,

20 8 of course, I did my own, I understood it and concluded

21 9 -- and took their advice.

22 Page 97:

23 4 A. I mean, I did say the Cole Kepro bankruptcy,

24 5 which is not one of the reasons listed, right?

25 6 Q. Sure. But why don't you explain to me why

26 7 that is a reason not to -- why is that a reason to

27 8 take Cole Kepro's offer rather than Mr. McAlary's

28 9 offer?

1 10 A. Because Cole Kepro can control their
2 11 bankruptcy. They can control whether they file or
3 12 not.

4 13 Q. But if Mr. McAlary purchases the litigation
5 14 against Cole Kepro, why would it matter to the Debtor
6 15 if the Debtor is getting that \$1 million?

7 16 MR. MANN: Objection to form.

8 17 A. You've got a 10 percent out there.

9 18 Q. (By Mr. Strother) Okay.

10 19 A. There's a 10 percent tail that is going to
11 20 presumably bring in more money into the thing. And if
12 21 you get zero out of that, then --

13 22 Q. You get one million?

14 23 A. That's right. That's right. But --

15 24 Q. That's the floor, right?

16 25 A. That's the floor,

17 Page 102:

18 12 Q. So very early on in this deposition I asked
19 13 you questions about the Debtor's valuation of -- and
20 14 evaluation of the Debtor's claim against Cole Kepro.
21 15 I'm now going to ask you similar questions about the
22 16 Debtor's evaluation and valuation of claims against
23 17 Mr. McAlary.

24 18 Has the Debtor performed any independent
25 19 analysis of the likelihood of succeeding on claims
26 20 against Mr. McAlary?

27 ...

28 22 A. Not that I'm aware of.

1 Page 103:

2 6 What about determining the
3 7 value of claims levied against Mr. McAlary in a
4 8 derivative fashion by the Committee?
5 9 A. I haven't seen anything.

6 Page 105:

7 7 I didn't come to a conclusion that it was or
8 8 wasn't appropriate that there was a probability of
9 9 collectability or not. I hadn't reached that point in
10 10 my analysis with respect to Chris's internal
11 11 transactions. And I just didn't -- once he moved out,
12 12 I was focused on selling the assets. I wasn't focused
13 13 on, you know, wanted to collect against Chris or
14 14 evaluate that or decide whether -- you know, here was
15 15 a pot of money to go after.

16 16 Q. (By Mr. Strother) Did you just say that you
17 17 hadn't evaluated the probability --

18 18 A. That's right.

19 19 Q. -- or you haven't evaluated the probability?

20 20 A. No, I haven't.

21 21 Q. Have not?

22 22 A. Of Chris's -- no. No, I haven't.

23 Page 108:

24 21 Q. Okay. So, as you sit here today, you're
25 22 aware that Mr. McAlary, through counsel, has continued
26 23 to point out that he has made a \$1 million offer for
27 24 the Cole Kepro litigation?

28 25 A. Yes.

1 Page 109:

2 4 ... I want to make sure that
3 5 you're aware of the last sentence as well, which is,
4 6 "At the request of the Debtor, such an offer was made
5 7 with the warrant that the purchaser would purchase the
6 8 claims against Cole Kepro even if Cole Kepro filed a
7 9 bankruptcy petition."

8 10 A. Yeah, I see it.

9 11 Q. So you understand that as you're giving your
10 12 testimony today?

11 13 A. I see it. I see it.

12 14 Q. Let me ask some questions again about the
13 15 Cole Kepro bad debt insurance policy.

14 16 I believe you testified that you've not
15 17 spoken to that insurance company, correct?

16 18 A. Yes.

17 ...

18 20 Q. (By Mr. Strother) Have you spoken to anyone
19 21 else other than counsel regarding the status of that
20 22 insurance claim?

21 23 A. No.

22 24 Q. Have you spoken with anyone on behalf of
23 25 Fifth Third about the insurance policy or the claim?

24 Page 110:

25 1 A. No.

26 2 Q. Have you ever spoken with anyone on behalf
27 3 of Fifth Third?

28 4 A. No.

1 5 Q. Do you have concerns -- strike that.
2 6 Does the Debtor have a contingency plan on
3 7 what it will do if the insurance company does not pay
4 8 the claim to Cole Kepro?

5 ...

6 10 A. I have not had any discussions on that
7 11 front -- or nothing of substance, let's put it that
8 12 way.

9 13 Q. (By Mr. Strother) Are you concerned about
10 14 any potential litigation that will be brought by the
11 15 insurance company against participants in this
12 16 transaction?

13 17 A. No.

14 18 Q. Has the Debtor done anything to minimize any
15 19 exposure to the insurance company should the insurance
16 20 company pursue any litigation claims against
17 21 participants to the claim -- the proposed settlement?

18 ...

19 24 A. Not that I'm aware of. There's nothing --
20 25 no plan that I've been involved in.

21 Page 112:

22 2 represent to you that Mr. Cook testified yesterday
23 3 that he has been in contact with Cash Cloud employees
24 4 about the defect claims being -- that form the basis
25 5 of the claims against Cole Kepro. Do you have any
26 6 knowledge of that?

27 7 A. I do not.

28 Page 114:

1 8 Q. (By Mr. Strother) I'm asking if you believe
2 9 it would be prudent on behalf of the Debtor to try to
3 10 preserve the asset, which is the claim against Cole
4 11 Kepro, by stopping Cole Kepro's CEO from gaining
5 12 information that, perhaps, devalues that asset?

6 13 A. That's not a tough question.

7 ...

8 15 A. I would certainly, as the Debtor and as the
9 16 person, the plaintiff, would not want the asset
10 17 devalued. But I've sold the asset, so what do I care?

11 Page 115:

12 16 You'd agree that the Debtor asked the
13 17 Court -- I'm shifting gears. You'd agree that the
14 18 Debtor asked the Court for approval to sell and then
15 19 market all of its assets including the litigation
16 20 claims?

17 21 A. Yes.

18 Page 116:

19 8 Q. Were the litigation claims included in the
20 9 bid placed by Forest Road at Westcliffe?

21 10 A. Don't recall.

22 11 Q. Were they included in the Elm Creek bid?

23 12 A. Don't recall.

24 ...

25 14 Q. (By Mr. Strother) Do you recall Mr. McAlary
26 15 bidding on the litigation at auction?

27 16 A. Don't recall.

28 17 Q. It's possible; you just don't recall?

1 18 A. Yes. It's possible. I don't recall.

2 19 Q. Do you remember what you advised Mr. McAlary

3 20 at the auction regarding the litigation?

4 21 A. I do not recall.

5 22 Q. If he testifies that you told him that the

6 23 Committee said they couldn't sell the litigation to

7 24 anyone because they hadn't had time to evaluate its

8 25 worth --

9 Page 117:

10 1 A. That sounds right.

11 2 Q. Okay.

12 3 A. That sounds right.

13 ...

14 5 Q. (By Mr. Strother) Do you know why you told

15 6 him that?

16 7 A. That's what I was told.

17 Page 121:

18 14 A. I don't have any information about Cole

19 15 Kepro's financial situation.

20 16 Q. Well, you testified earlier that you were

21 17 made aware of certain financial information prior to

22 18 the time that you filed your Declaration, correct?

23 19 A. I was told it was postured -- it was lawyer

24 20 talk. It was postured that Cole Kepro would go

25 21 bankrupt. I didn't receive any documents, see any

26 22 financial information, any financial statements,

27 23 anything like that. It was posturing. So that's all

28 24 I have for you.

1 Page 122:

2 12 ... I can orient you to a time frame when there
3 13 was an effort ongoing to sell the litigation. And so
4 14 there was back and forth. There were conversations
5 15 among folks who were interested in that litigation,
6 16 and Chris happened to be one of those people, and he
7 17 and I did have conversations about -- I mean, I had
8 18 individual conversations with him about clarifying his
9 19 offer and making it, as best he could, making it match
10 20 the offer to Cole Kepro.

11 21 In other words, let's just put it this way.

12 22 What I was trying to do was facilitate a -- I was
13 23 trying to facilitate a situation where we could match
14 24 offers, right? Where the McAlary offer matched the
15 25 creditors committee offer and the Cole Kepro offer in

16 Page 123:

17 1 the relevant aspects, right? That they would -- we
18 2 could evaluate them. That was the point. That was
19 3 the point of the conversation with Chris, was to say
20 4 to him, These are the things you need to clarify and
21 5 whatnot.

22 6 Q. So this would have been sometime in the
23 7 summer of --

24 8 A. Yes.

25 9 Q. -- 2023; is that right?

26 10 A. Yes.

27 Page 127:

28 6 And I told Chris and Chris said, Hey, look

1 7 at everything. It's wide open, I'll give you every
2 8 answer you want, I'll give you everything -- anything
3 9 you need, just tell me what you want, and I will, you
4 10 know, I'll answer your questions.

5 ...

6 23 Q. Have you ever discussed any other aspects of
7 24 the derivative claims against Mr. McAlary with
8 25 Mr. McAlary?

9 Page 128:

10 1 A. You know, no. Nothing other than I couldn't
11 2 understand it. There were -- I mean, I sensed all
12 3 over the place that folks were unhappy with him, you
13 4 know, and I couldn't understand it because he was very
14 5 cooperative with me. He was very forthcoming. If I
15 6 asked for a document or a piece of information or if I
16 7 asked for something, I got it.

17 8 So I, you know, didn't understand it, and
18 9 still -- still don't....

19 12 ... I'd like to you to pull
20 13 up Exhibit 10, if you don't mind. Just let me know
21 14 when you're there.

22 15 A. All right. We're set.

23 16 Q. All right. Great. So you looked at this
24 17 document earlier, correct?

25 18 A. Yes.

26 19 Q. And this is an August 21st, 2023, email from
27 20 Dawn Cica; is that right?

28 21 A. Yes.

1 22 Q. And Ms. Cica is Mr. McAlary's attorney,

2 23 correct?

3 24 A. Yes.

4 25 Q. And she writes, "Brett, attached please find

5 Page 129:

6 1 an updated offer by CC BR Holdco, LLC, to purchase the

7 2 estate's claims against Cole Kepro for \$1 million and

8 3 the estate's claims against Bitaccess and BitCoin Depot

9 4 for \$200,000 as well as the payment of the arbitration

10 5 deposit in Canada of Canadian dollars in the amount of

11 6 \$261,389,14." Do you see that?

12 7 A. Yes.

13 Respectfully submitted this 18th day of November 2023.

14 **CARLYON CICA CHTD.**

15 */s/ Candace Carlyon*

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17 Nevada Bar No. 2666

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CERTIFICATE OF SERVICE

I am an employee of Carlyon Cica Chtd. On the date of filing of the foregoing papers with the Clerk of Court I caused a true and correct copy to be served in the following manner:

☒ ELECTRONIC SERVICE: Pursuant to LR 2002 of the United States Bankruptcy Court for the District of Nevada, the above-referenced document was electronically filed and served on all parties and attorneys who are filing users through the Notice of Electronic Filing automatically generated by the Court.

☐ UNITED STATES MAIL: By depositing a true and correct copy of the above-referenced document into the United States Mail with prepaid first-class postage, addressed to the parties at their last-known mailing address(es):

☐ OVERNIGHT COURIER: By depositing a true and correct copy of the above-referenced document for overnight delivery via a nationally recognized courier, addressed to the parties listed below their last-known mailing address.

☐ FACSIMILE: By sending the above-referenced document via facsimile to those persons listed on the attached service list at the facsimile numbers set forth thereon.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Candace Carlyon

An employee of Carlyon Cica Chtd.

EXHIBIT 1

EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In Re:)
)
CASH CLOUD, INC.,)
dba COIN CLOUD,)
)
Debtor.)
)
) CASE NO.
) BK-23-10423-MKN
) Chapter 11
-----)

DEPOSITION OF DANIEL AYALA
Las Vegas, Nevada
November 9, 2023
2:20 p.m.

REPORTED BY:
CYNTHIA HUDAK, RPR
NVCCR #987

1 DEPOSITION OF DANIEL AYALA, was taken by Counsel
2 for Chris McAlary on November 9, 2023, at 2:20 p.m. at
3 the law offices of Fox Rothschild, LLP, One Summerlin,
4 1980 Festival Plaza Drive, Suite 700, Las Vegas,
5 Nevada, before Cynthia A. Hudak, RPR, Nevada Certified
6 Reporter No. 987.

7
8
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P R O C E E D I N G S

DANIEL AYALA,

a witness herein, having been first duly sworn by the
Certified Reporter to speak the truth and nothing but
the truth, was examined and testified as follows:

EXAMINATION

BY MR. STROTHER:

Q. Would you please state your full name for
the record?

A. Dan Ayala, A-Y-A-L-A.

Q. And to further identify yourself for the
record, would you please give me your date of birth
and your current residential address?

A. I'm not going to give you my date of birth
or my residential address, because those are serious
privacy issues, and I happen to be a maniac on that,
unfortunately. But, you know, I'm not going to do
that.

Q. Okay. Well, I'm not going for force you to.
If there's some reason --

A. You can get it through him in a -- you know,
an email or what have you if you need it, if you need
to get to it.

Q. Sure. Understood.

A. We can deal with that.

1 Q. I don't think it's a problem.

2 MS. MILLER: I'm sorry. This is Laura
3 Miller for the Committee.

4 We are having trouble hearing Mr. Ayala. I
5 don't know if we can put a microphone closer to him or
6 just something.

7 MR. STROTHER: Let's go off the record.

8 (A discussion was held off the record.)

9 Q. (By Mr. Strother) Okay. Mr. Ayala, you
10 recognize that you've been sworn in to tell truth for
11 this deposition here today?

12 A. Yes.

13 Q. Okay. I understand that you're an attorney?

14 A. I am.

15 Q. Okay. Have you ever taken a deposition?

16 A. I have.

17 Q. How many depositions have you taken?

18 A. Many.

19 Q. Okay. I'm not going to go over any of the
20 rules of depositions with you, because I think you
21 probably know them.

22 A. Yes, I know them and -- but if you want to
23 go through them, that's fine.

24 Q. No, no.

25 A. It's up to you.

1 Q. Let's get back some lost time and go past
2 that.

3 A. Yes.

4 Q. But tell me how many depositions you've
5 actually given.

6 A. How many I've taken you mean?

7 Q. No, no. As a witness, how many times have
8 you been sworn in and given a deposition?

9 A. Max, five.

10 Q. Okay.

11 A. I think of -- I can think of two. I may
12 have had more, but...

13 Q. Did any of those depositions have anything
14 to do with Cash Cloud?

15 A. No.

16 Q. And from time to time I'm going to jump in
17 and work on vocabulary with you. When I say Cash
18 Cloud, do you understand that that is an entity also
19 known as Coin Cloud?

20 A. Yes.

21 Q. And also referred to in this proceeding as
22 the Debtor?

23 A. Yes.

24 Q. Okay. Did any of those depositions have
25 anything to do with Cole Kepro?

1 A. No.

2 Q. Do you know who Cole Kepro is?

3 A. Yes.

4 Q. All right. Did any of those depositions
5 have anything do with any of the unsecured creditors
6 regarding the Debtor's bankruptcy?

7 A. No. And just to move it long --

8 MS. MILLER: Objection.

9 A. -- those depositions that I gave were
10 decades ago.

11 Q. (By Mr. Strother) Thank you. All right.
12 What did you do to prepare for today's deposition, if
13 anything?

14 A. I reviewed my declarations. I reviewed the
15 settlement agreement that was proposed. I reviewed,
16 obviously, the documents that were relative to this
17 thing, and, of course, I spoke with counsel.

18 Q. And do you have counsel here today?

19 A. I do.

20 Q. Is that Mr. Mann here to your right?

21 A. Yes. Yes.

22 Q. Okay. Can you tell me how long you spoke
23 with Mr. Mann or anyone from Fox Rothschild to get
24 ready for today's deposition?

25 A. Hour.

1 Q. Let's begin by looking at your Declaration.

2 A. Okay.

3 Q. I'm going to mark it as Exhibit 1. It's not
4 there yet.

5 (Exhibit Number 1 was marked.)

6 MR. MANN: And this will probably be a good
7 time just to put on the record the stipulations we
8 made.

9 MS. STROTHER: Yes.

10 MR. MANN: Objection to one party is an
11 objection for all, and all objections except to those
12 as to form shall be reserved to the time of trial. Is
13 that good?

14 MS. STROTHER: I agree.

15 MR. MANN: Okay. All right. There you go.
16 Pulled it up.

17 Q. (By Mr. Strother) By the way, Mr. Ayala,
18 from time to time I might have an informal hard copy
19 of these exhibits. If you would want to look at a
20 hard copy, I might have it, and you'll have to trust
21 my representation that it's the same document.

22 Some of them will be easy to do that because
23 they'll have a document number up at the top.

24 A. Sounds good. And I like hard copies better.

25 Q. Okay. Well, here, marked as Exhibit

1 Number 1 is your Declaration. I'm handing you a hard
2 copy.

3 A. Yeah.

4 Q. I'd like you to go to Paragraph 3, please.

5 A. Yep.

6 Q. Do you see that you declared that you are
7 making the Declaration in support of -- I'm going to
8 say the entire name of the motion and then give it a
9 shorthand -- the Joint Motion to Approve Settlement
10 Agreement with Cole Kepro International, LLC, Pursuant
11 to Federal Rule of Bankruptcy Procedure 9019?

12 A. Yes, I see that.

13 Q. Can we call that motion the 9019 motion?

14 A. Sure.

15 Q. Excellent. My first question is -- it's
16 styled as a joint motion -- who are the two entities
17 that are jointly filing the 9019?

18 A. The Debtor and Unsecured Creditors
19 Committee, as I understand it.

20 Q. Okay. With regard to the process of
21 preparing that motion, who was it on the Debtor's side
22 that was communicating with someone on the Committee's
23 side to put it all together?

24 A. I couldn't tell you. I would say that we
25 have financial advisors, that's Province, and we have

1 counsel, that's Fox Rothschild. The specifics of the
2 people there were Brett Axelrod, is who I -- at Fox
3 Rothschild who I dealt with, and Tanner James and
4 Dan -- at Province the two --

5 Q. Mr. Moses, is that --

6 A. Dan Moses, yes.

7 Q. Okay.

8 A. Those were the people that I communicated
9 with in preparation for and evaluating what was said.

10 Q. Understood.

11 A. What was put in this joint motion or what I
12 declared.

13 Q. Understood. When we go into -- when I go
14 into with you specific items in the Declaration, I may
15 try to get more specific with you if you're able to.
16 I know I asked a fairly broad question, who was all
17 involved in the communications.

18 A. Yeah.

19 Q. Were you ever dealing, you, Mr. Ayala, ever
20 dealing directly with anyone on behalf of the
21 Committee regarding the 9019 motion?

22 A. No, I did not.

23 Q. Okay.

24 A. I relied on my -- Fox Rothschild and the
25 financial advisors.

1 Q. Okay. Let's take a moment and let me ask
2 you what is your position with the Debtor?

3 A. I am an independent director.

4 Q. So how -- what are your duties as an
5 independent director to Cash Cloud while it is in
6 bankruptcy?

7 A. I mean, you and I both understand what a
8 director does. A director of a company has oversight
9 over general policy, and the folks who are the CEOs
10 and the operators do the things that need to be done.

11 So once -- Chris and I worked -- Chris
12 McAlary and I worked together, and my role was fairly
13 limited in the beginning because Chris owned the
14 company, had it, and whatnot. And then, when he
15 resigned from his position as director, I took on the
16 broader role of setting those policies and, you know,
17 hoping that folks execute them with the guidance of,
18 of course, the people who are executing the policies
19 and the attorneys and the financial advisors.

20 Q. Does the -- I was going to ask a silly
21 question. I'm going to ask it anyway.

22 Does the buck stop with you when it comes to
23 decisionmaking from the Debtor?

24 MR. MANN: Objection to form.

25 MS. MILLER: Object to form.

1 A. Yeah, I would think so. I would think
2 that, you know, when a decision needs to be made,
3 somebody -- the independent director needs to make
4 that decision, yes.

5 Q. (By Mr. Strother) And by my question I
6 wasn't trying to suggest that you don't rely on
7 professionals to aid you in that decisionmaking
8 process.

9 A. Of course.

10 Q. And as you're sitting across the table from
11 me, I just want to confirm that you're ultimately the
12 person that gets to make the decisions for the Debtor,
13 right?

14 A. That's right.

15 Q. Okay.

16 A. As you said, with the advice of financial
17 advisors and counsel and everybody else. They make it
18 pretty easy, let's put it that way.

19 Q. Fair enough.

20 A. They do the research and they put the time
21 in, and so what you get is, right, a set of
22 information from which you can then make a decision.

23 Q. Fair enough. Let me make another document
24 an exhibit. This is going to be the 9019 motion.

25 (Exhibit Number 2 was marked.)

1 Q. Okay. It's been published to everyone. I'm
2 going to -- Mr. Ayala, I don't have a hard copy of the
3 9019 motion.

4 A. I've got it in front me, that's fine, on the
5 computer.

6 Q. Okay. I really just wanted to get this on
7 the record in front you right now, because, if you go
8 back and look at Paragraph 3 of Exhibit 1, it says
9 that Exhibit 2 is what you're giving the Declaration
10 in support of, right?

11 A. Okay.

12 Q. Do you understand that and agree with that?

13 A. Yes.

14 Q. Okay. Well, let's continue looking at
15 Exhibit 1. Go on to Paragraph 4, please.

16 A. All right.

17 Q. After you've taken a moment and read that to
18 yourself, I have a couple questions about it.

19 A. I'm ready.

20 Q. Okay. Do you see Paragraph 4 refers to a
21 couple of state court lawsuits?

22 A. Yes.

23 Q. Okay. I want to give those shorthand names
24 so we know what we're talking about later on in this
25 deposition.

1 A. Okay.

2 Q. Do you see that there is a lawsuit
3 referenced that was filed by Cash Cloud against Cole
4 Kepro?

5 A. We're talking about Sub Item (i), correct?

6 Q. Yes.

7 A. Okay. CKI is what you want to call it?

8 Q. Yeah, from time to time I might call Cole
9 Kepro CKI. It rolls off the tongue easier for me.

10 And do you see the other piece of litigation
11 is the litigation filed by CKI against Cash Cloud?

12 A. Yes.

13 Q. Okay. Let me show you what I'm going to
14 mark as Exhibits 3 and 4. I don't have hard copies,
15 but I actually don't have a lot of questions about
16 them.

17 (Exhibit Number 3 was marked.)

18 Q. Exhibit 3 has been uploaded.

19 A. Okay. That's the item, Sub (i), CKI case
20 against Cole Kepro.

21 Q. No. I believe you just said CKI versus Cole
22 Kepro, which is the same entity.

23 A. Cash Cloud against Cole Kepro.

24 Q. Yes.

25 A. Cash Cloud against Cole Kepro. That's the

1 Exhibit 3.

2 Q. Oh, you want to call that the CKI
3 litigation?

4 A. We'll call it whatever you want to call it.
5 Just tell me what it is.

6 Q. Let's do that, but let's not call it -- for
7 the record, let's not call it the CKI litigation yet.
8 I thought that's what you were going to call it.

9 (Exhibit Number 4 was marked.)

10 Q. All right. I've now uploaded Exhibit 4.

11 A. Okay.

12 Q. Take a look at Exhibit 4, tell me what you
13 see.

14 A. I don't have 4 yet. Okay. There it is.
15 And that is the Cole Kepro litigation
16 against Cash Cloud.

17 Q. Correct. So my first question is, do you
18 understand that the litigation filed by Cash Cloud was
19 filed four months earlier than the litigation filed by
20 CKI?

21 A. I didn't. I was not aware of that, but I
22 accept your premise.

23 Q. I'm not sure I'm making any promises yet.
24 I'll represent that Exhibits 3 and 4 have file stamp
25 dates on it.

1 A. That's it. They're right there.

2 Q. Okay. Should be October on Exhibit 4.

3 A. Yeah, 10/24.

4 Q. And if you look at Exhibit 3, it should be
5 in June.

6 A. There you go. 6/17/22. There you go.

7 Q. All right. Let's focus on the Cash Cloud
8 Complaint, Exhibit 3. Have you read that Complaint
9 before?

10 A. No.

11 Q. Okay. Has the Debtor evaluated the claims
12 in that Complaint?

13 A. Yes.

14 Q. Tell me --

15 A. My counsel has evaluated that Complaint and
16 given me advice on what the terms and complaints are
17 and the validity, probability and has given me advice
18 on, you know, what the collected probabilities and
19 collectability and all of those things, right.

20 Q. Can you tell me what the Debtor's position
21 is on the validity of the claims in that Complaint?

22 MR. MANN: I'm only going to object to the
23 extent of communications with his counsel for
24 attorney-client privilege, but anything else is fine.

25 A. As I understood it, at least, there was a

1 strong claim the Debtor had against Cole Kepro. The
2 problem was collection. The major issue was whether
3 or not, you know, you can collect on whatever damages
4 you may establish.

5 Q. (By Mr. Strother) Did the Debtor look
6 into -- and when I say "the Debtor," I understand that
7 you are having professionals do this, but I'm using
8 Debtor to encapsulate --

9 A. Sure.

10 Q. -- the various arms of the Debtor octopus.
11 The arms being professionals, right? The Debtor --
12 let me get back to questions. I shouldn't get on a
13 pedestal and start talking.

14 Did the Debtor look into -- aside from the
15 collectability of damages, the likelihood or
16 probability of being able to win damages?

17 A. My understanding was that the damages would
18 be able to be established that Cole Kepro had, you
19 know, made mistakes -- and this is from Jimmerson.
20 Jimmerson, I believe, was handling this matter. And
21 so folks thought there was a strong likelihood that
22 you could establish damages. The big issue was
23 collection.

24 So let's say you go establish a million
25 dollars in damages. Are you going to be able to

1 collect on it? And the answer was no. Cole Kepro was
2 threatening or communicating that they would go into
3 bankruptcy. And Cole Kepro had a financial backer,
4 and that financial backer made it clear that -- and it
5 was an individual -- but made it clear that he was not
6 going to further fund Cole Kepro's issues and so --

7 Q. If I name a couple of names, can you tell me
8 if one of those people was the individual we were
9 thinking of?

10 A. I couldn't, no.

11 Q. Okay. You don't know who it is?

12 A. That's right.

13 Q. Okay.

14 A. That's right.

15 Q. Can I try anyway?

16 A. Sure.

17 Q. What about Paul Cook?

18 A. Don't recognize the name.

19 Q. Okay. And I believe the other man's name --
20 last name is Gaffney?

21 A. Don't recognize that name, either.

22 Q. Okay.

23 A. Again, they were, for me, placeholders,
24 right? The financial backer, I don't -- you know.

25 Q. I understand.

1 A. Whether the name resinated with me or not...

2 Q. Understood. When the Debtor was -- strike
3 that.

4 You used the name Jimmerson. Is that the
5 attorney who was representing Cash Cloud and the
6 litigation against Cole Kepro?

7 A. That's right.

8 Q. Okay. When the Debtor --

9 A. At that point.

10 Q. My understanding is that he's been recently
11 terminated?

12 A. Okay. And that could be the case. If
13 that's the case, I don't know it.

14 Q. Well, I don't know it to be the case,
15 either.

16 A. Okay.

17 Q. It is my understanding from word of mouth,
18 but you don't know anything about that?

19 A. That's right.

20 Q. Okay.

21 A. That's right.

22 Q. So if he was terminated, it was done without
23 your participation; is that accurate?

24 A. That's right.

25 Q. Is that weird?

1 MS. MILLER: Objection.

2 A. No, because we had filed the motion for
3 joint settlement, right? There was a resolution to
4 it. Why would you keep the guy on and have him
5 continue doing things and incurring bills, right? I
6 mean, in a bankruptcy you're trying to preserve the
7 assets of the estate as much as possible.

8 So it doesn't strike me as odd or -- it
9 would be the natural course. It doesn't strike me as
10 something I would need to be consulted on. If we're
11 settling a case, then yes, we're getting rid of
12 attorneys, and we're not continuing to incur
13 unnecessary costs.

14 Q. (By Mr. Strother) Well, do you know if the
15 Debtor was incurring any unnecessary costs in that
16 litigation while it's been on stay?

17 A. I don't.

18 Q. And you asked me a question, which was, why
19 would we not just go ahead and terminate the attorney
20 if we're settling the lawsuit? I'm going to answer,
21 which is rare, right, in a deposition for an attorney
22 to answer questions, but wouldn't you agree that this
23 9019 motion has to be approved by Judge Nakagawa?

24 MR. MANN: Objection to the form.

25 A. I would agree.

1 Q. (By Mr. Strother) So, I mean, if there's
2 not a 100 percent chance that he approves this,
3 especially in the case of Mr. McAlary's objection,
4 then maybe it's a good idea to keep the attorney
5 onboard, just sitting on ice?

6 MR. MANN: Object to the form.

7 A. I mean, I guess you can take that position,
8 and I, you know, don't necessarily have an argument
9 with it.

10 Q. (By Mr. Strother) Do you know who on behalf
11 of the Debtor would have made the decision, since it
12 wasn't you, to terminate the attorney representing
13 Cash Cloud in the litigation brought against Cole
14 Kepro?

15 A. It would have -- the answer --

16 MS. MILLER: Object.

17 A. The direct answer is no. But I could give
18 you an idea, which would be my counsel, Fox
19 Rothschild, and the financial advisors that we have
20 who would have looked at the situation and said --
21 again, I don't, as an independent director, don't need
22 to be involved in every detail of decisions. But I
23 certainly approve of the idea that, we have a
24 settlement, we're going to court and getting that
25 resolved, and so people -- financial advisors and Fox

1 Rothschild are executing on those decisions and, you
2 know, back them up.

3 Q. (By Mr. Strother) Understood. A moment ago
4 you testified that it appeared that there was a strong
5 likelihood of establishing damages, and then the
6 paraphrase, but the problem -- the issue was
7 collectability?

8 A. That's right.

9 Q. Is that accurate?

10 A. Yes.

11 Q. When the Debtor was looking into
12 establishing damages was the Debtor estimating what
13 the range of damages could be?

14 A. My information on the establishment of
15 damages and what the range was came from Chris
16 McAlary.

17 Q. Okay.

18 A. So he was my main source of information on
19 the quality of the lawsuit, the damages that were out
20 there, et cetera. And he had a number, you know, in
21 his mind was huge.

22 Now, I can tell you that I spoke with Moses
23 at Province and Brett Axelrod at Fox Rothschild who
24 both -- and Jimmerson, who did not have Chris's view
25 of the extent of damages. Their views -- Fox,

1 Province, and Jimmerson's views were a lot less, put
2 it that way.

3 So Chris, I think, was talking in the tens
4 of -- I don't remember the numbers exactly, because
5 he, you know, evaluated it as a guy -- you know, he's
6 a businessman, and that was -- you know, that was his
7 evaluation. I gave more credibility to what Jimmerson
8 and Fox and Province said in terms of those numbers.
9 And so those numbers weren't in the, you know, tens of
10 millions. They were much less.

11 Q. Still in the millions, though?

12 A. I think Jimmerson estimated it -- and,
13 again, I'm trying to recollect here, so if I'm wrong
14 on it, but I think it was 3 million was Jimmerson's
15 assessment. And I could be mistaken. So I don't
16 remember the specific number Jimmerson gave, but
17 clearly, you know, it was a factor of, you know, of a
18 small percentage of what Chris thought.

19 Doesn't mean Chris was wrong. I'm not
20 suggesting he's wrong, either. I'm just saying, you
21 know -- that's the information I had. That's all I'm
22 telling you.

23 Q. My follow-up question, you answered part of
24 it, which was, do you have an opinion about who's
25 right or who's wrong in that range of damages

1 assessments?

2 A. I do not.

3 Q. And are you familiar with -- other than
4 perhaps Cole Kepro, are you familiar with anyone
5 suggesting that the potential damages are much, much
6 less than the numbers that you've just been testifying
7 about or much, much higher than the numbers that
8 you've just been testifying about?

9 A. I'm not sure I understand the question, but
10 I'll give you my best shot at the answer.

11 Chris thought that, you know, tens of
12 millions Cole Kepro was liable for. And Province,
13 Jimmerson, who was actually litigating the case, and
14 Fox thought it was substantially less. At the max, it
15 was, you know, in this \$3 million range, which, again,
16 was just a number put out there.

17 There was no -- so we, as lawyers, right,
18 quantify, right, what the damages are. So what I'm
19 trying to communicate to you is the -- that exercise
20 didn't happen, other than -- really Jimmerson was the
21 only one who I thought actually had quantified, right,
22 had gone through the contract, right? I mean, when
23 you quantify the damages in a litigation case, you go
24 through the contract, say what this is worth, what
25 that's worth. You put the numbers together.

1 Jimmerson was the only one that I felt had
2 actually quantified it. Chris's number was -- and,
3 again, he's a good businessman and, you know, he had
4 his justification, and I just don't remember it, and I
5 don't -- you know, I don't know what that -- what his
6 quantification was.

7 Q. Understood.

8 A. So I don't know if that's helpful or not.

9 Q. I think you answered my question.

10 Given everything that you just said, it
11 sounds like you would agree with the following: The
12 claims against Cole Kepro were an asset -- or are an
13 asset of the Debtor?

14 A. Absolutely.

15 Q. And that asset has some value?

16 A. That's the question.

17 Q. Well, I mean --

18 A. That's the question, right?

19 Q. Well, right now the Debtor is asking the
20 Court to approve a 9019 motion where the Debtor would
21 get 850,000. So I think everyone should agree, right,
22 that it has at least that value?

23 A. Sure.

24 Q. We'll get to other valuations of that in a
25 minute. But why don't I ask you, has the Debtor

1 performed any valuation of what that asset is worth?

2 A. Again, I go back to Province, that's the
3 financial advisor for the Debtor. Province did that
4 valuation, did that analysis, and came to the
5 conclusion that that \$850,000 was a good valuation for
6 the asset. I mean, that's all I can rely on.

7 Q. Did that -- what you're calling a valuation,
8 was that done as part of the evaluation of the 9019
9 motion? Meaning, did Province come to the conclusion
10 about 850- separate and apart from the conversation
11 going on with Cole Kepro, or was Province asked by the
12 Debtor to opine on whether 850- was a good price?

13 MR. MANN: Object to form.

14 A. So the way it would have happened -- and
15 this is my recollection of it. My recollection is the
16 Debtor had a set of assets, right, that it had to
17 liquidate for purposes of paying off, you know, and
18 dealing with the estate, right? And this was one of
19 those assets.

20 The Debtor went to -- my understanding is --
21 a broad range of potential purchasers for this asset
22 and got the response they got and distilled it all
23 down. And there were, you know -- it's nice when you
24 can say, you know, apples are apples and oranges are
25 oranges. But in this case you had different factors

1 and different terms and different -- right? I mean,
2 you had a lot different things to deal with.

3 And so what they concluded after all of
4 their analysis and all of their work was that this was
5 the best situation for the Debtor to collect money for
6 this asset at value.

7 Q. (By Mr. Strother) Okay. I understand your
8 answer. Let me try to ask my remaining question on
9 that topic to get away from the actual deal proposed
10 in the 9019 motion.

11 Before any conversations were had with Cole
12 Kepro about Cole Kepro buying the litigation against
13 itself, did the Debtor, through its professionals,
14 place or try to place a value on the litigation
15 against Cole Kepro?

16 A. I don't know the answer to that.

17 MS. MILLER: Object to form.

18 Q. (By Mr. Strother) Okay.

19 A. I didn't see any, let's put it that way. I
20 didn't see sort of a -- if the question you're asking
21 is, Hey, was there a value put on it, right?

22 Q. Right.

23 A. Jimmerson put a value on it, right, and
24 whatnot. But Jimmerson's value was his value.
25 Remember, that doesn't include the collectability

1 provision.

2 Q. Right.

3 A. Right? I mean, so I think I told you what I
4 know in terms of what valuations were put on it. I
5 think you have the universe of information that I
6 knew --

7 Q. Okay.

8 A. -- in terms of, you know, what the value of
9 that thing was. And, again, let's make sure we put
10 this thing in context, because we're going through a
11 bankruptcy estate, right? There's a process. So
12 there's other processes going on, too. And part of
13 those processes are disposing of assets and collecting
14 money and paying it out to the people who are owed the
15 money.

16 But yeah, I mean, I got to say this
17 bankruptcy thing is, you know, it's interesting when
18 you can buy your own litigation, right?

19 Q. Very aptly put.

20 Do you have significant bankruptcy
21 experience?

22 A. Not personally, so that's a good thing.

23 Q. Yeah, sure. I'll drink to that.

24 A. But, yeah, I mean, enough to get me in
25 trouble.

1 Q. Okay. Let me move on to Paragraph 6 of your
2 Declaration, which is Exhibit 1.

3 A. Okay. All right.

4 Q. You beat me to it, so hang on a moment,
5 please.

6 A. Take your time.

7 Q. Okay. I'm going to read Paragraph 6 to you.
8 Will you please make sure I'm reading it correctly,
9 then I'll have some questions.

10 A. Sure.

11 Q. In Paragraph 6 you declare: "The Parties,
12 after months of good faith, arms-length negotiations
13 through sophisticated counsel, have reached a
14 resolution of their disputes, which resolution is
15 memorialized in the settlement agreement." Did I read
16 that correctly?

17 A. Yeah.

18 Q. All right. Are you aware that Mr. McAlary
19 is objecting to the 9019 motion?

20 A. Yes.

21 Q. Okay. Are you familiar with the reasons
22 that he's objecting, his stated reasons?

23 A. Other than the only familiarity I have is
24 that he thinks his offer is better than the one put in
25 front of the joint settlement.

1 Q. Okay. Are you aware that Mr. McAlary has
2 complained about having Cole Kepro act as a committee
3 member and specifically the co-chair of the --

4 A. Yes.

5 Q. -- UCC? Okay.

6 A. Absolutely. I'd be jumping up and down
7 myself.

8 Q. So the reason I'm asking if you're aware of
9 those things so that you'll understand why I'm asking
10 the following questions, because you use "good faith"
11 and "arm's length."

12 I guess -- let me start with the other part
13 of that sentence, which is "after months." Do you
14 know when Cole Kepro and the Debtor first began
15 talking about resolving the matters among themselves?

16 A. I couldn't give you a date, no. The answer
17 is no, I can't give you a date.

18 Q. I'll represent to you that I deposed Paul
19 Cook yesterday, and he said the way this entire 9019
20 process began is when he decided that he wanted to put
21 it behind him, and so he picked up the phone and
22 called someone at the Debtor's office -- another
23 attorney is going to remember who that is. It wasn't
24 you. It might have been --

25 MS. MILLER: Objection.

1 MR. STROTHER: Was that an objection?

2 MS. MILLER: Sorry. Thought you were done.

3 It was.

4 MS. STROTHER: No worries.

5 Q. (By Mr. Strother) It may have been
6 Province. I just don't remember who it was. It may
7 have been Tanner James.

8 But I'll represent to you that he said that
9 he made that call and then the same day went over -- I
10 think it was Province's office -- went over to
11 Province's office and began talking.

12 A. Okay.

13 Q. And I'll represent to you that he said that
14 was at the very, very end of June because it happened
15 before July 4th.

16 A. Okay.

17 Q. So do you have any reason to disagree with
18 me --

19 A. No.

20 Q. -- or disagree with Mr. Cook that the
21 conversation began in late June of 2023?

22 A. No.

23 Q. Okay. And do you know when the 9019 motion
24 was filed with the court?

25 A. Oh, I think it's right on here. 10/20,

1 October 20th.

2 Q. Do you know when the \$850,000 figure was
3 first announced in open court?

4 A. I don't know that. I remember it was at
5 California Pizza Chicken. I was sitting and having a
6 conversation with counsel for the Unsecured Creditors
7 Committee -- there was other people on the call. I
8 don't remember everybody on the call, but that is my
9 recollection of it, and it would have been sometime in
10 the summer of 2023 when this was sort of coming to
11 fruition, this deal was coming to fruition.

12 Q. Okay. So let me get to the questions that I
13 was hinting that I wanted to get at.

14 The deal proposed in the 9019 motion is
15 ultimately a deal between the Debtor and Cole Kepro,
16 correct?

17 A. Yes.

18 Q. Who was negotiating on the Debtor's behalf
19 with Cole Kepro?

20 A. It would have been Fox.

21 Q. Okay. Did -- go ahead.

22 A. Just by the way, just so you're clear, I
23 mean, I'm not sitting here telling you that, you know,
24 I was in the dark on anything. I mean, I have regular
25 communication and did have at that time with the Fox

1 folks and with the Province people. I mean, you know,
2 it wasn't done in the dark or something without my
3 knowledge. I was -- I was involved, and they kept me
4 up to date on the negotiations. And as advisors do,
5 they, you know, give you advice and make
6 recommendations, and so -- you know, I was there all
7 the way, is my only point to make to you. I don't
8 want to sit here and make you think I was sitting in
9 the dark doing, you know, nothing.

10 Q. This is going to get an objection. I would
11 normally assume that you were not kept in the dark.
12 And I'll represent to you that Paul Cook yesterday
13 testified under oath that he wasn't involved one
14 single bit in the negotiations between Cole Kepro and
15 the Debtor; meaning, the first time he saw what the
16 deal was is when the 9019 motion was filed in October.

17 So that's why I'm asking how involved you
18 were.

19 A. Yeah, I was involved.

20 Q. Okay.

21 A. We were talking on the --

22 MS. MILLER: Objection.

23 Q. (By Mr. Strother) Okay. What I do want to
24 find out, to the extent you know, who were the
25 counterparts --

1 A. On the other side?

2 Q. -- in those negotiations? Right.

3 So if we assume that -- I don't want to
4 assume anything. You testified that the Fox people
5 were the ones acting on the Debtor's behalf while
6 negotiating the 9019.

7 A. Not accurate.

8 Q. Not accurate?

9 A. Not accurate. So keep in mind that my
10 understanding at the time was that this set of funds
11 was going to go to the Unsecured Creditors Committee.
12 So they had a major role in pushing, deciding,
13 negotiating, et cetera.

14 So while our folks, you know, on behalf of
15 the Debtor were involved, there was nothing -- my
16 understanding was the Debtor wasn't getting anything
17 out of this. This was not going to be something
18 that -- it was all going to go -- it was the
19 interested party. The Unsecured Creditors Committee
20 was the interested party in this thing, right? They
21 were the ones who were going to get the money that was
22 going to come from this.

23 And so, you know, they were driving the
24 discussion and the negotiation. And we, of course,
25 you know, had our responsibilities. I, as an

1 independent director -- Fox is advising me and
2 Province is -- my financial advisors had, you know,
3 everybody had their role and did, I believe, play
4 their role. But ultimately, the Unsecured Creditors
5 Committee was a big driver. And given that -- again,
6 without going into what the detailed advice I received
7 was, I mean, given that it was -- it was a situation
8 where they had a lot of voice. And we listened to
9 them.

10 Q. It sounds like you're telling me that when
11 it came to negotiating between Cole Kepro and the
12 Debtor that the Committee was basically in the
13 driver's seat for those negotiations?

14 MR. MANN: Object to form.

15 A. I wouldn't say that.

16 MS. MILLER: Object to form.

17 Q. (By Ms. Miller) But you said they were
18 driving the process?

19 A. I did say that. That's exactly what I said.
20 They were driving the process. We weren't, you know,
21 asleep at the wheel. We were paying attention to what
22 our responsibilities were, and I think -- you know, I
23 think I got the right input and advice, but yes, I
24 said the words I said.

25 Q. Understood. I apologize to the extent you

1 felt I was trying to twist them around on you. I'm
2 trying to simplify them.

3 A. Yeah.

4 MS. STROTHER: Would it be okay if I took
5 just a five-minute break?

6 MR. MANN: Sure.

7 MR. STROTHER: All right. Thanks.

8 (Recess from 3:02 p.m. to 3:08 p.m.)

9 Q. (By Mr. Strother) Mr. Ayala, thanks for the
10 break. Are you ready to go on?

11 A. Sure.

12 Q. All right. I was just asking you about who
13 was participating in the negotiations between Cole
14 Kepro and the Debtor as it pertains to the deal that's
15 ultimately proposed in the 9019 motion.

16 A. Yes. And just to clarify so we can put it
17 on the record, it was Fox, it was Province, it was the
18 Unsecured Creditors Committee, it was their counsel.
19 Everybody was participating in the process.

20 Q. Do you know who was communicating to Cole
21 Kepro?

22 A. The answer to that question is no, I could
23 not give you a rundown of each email and each
24 telephone conversation and whatnot. I can tell you
25 that I would be copied on emails from and to the

1 Unsecured Creditors Committee's lawyers, to our
2 lawyers, from our lawyers back to Cole Kepro. You
3 know, there was a multitude of engagement on
4 everybody's part. But as I said, I already, you know,
5 made the statement to you, and I don't change that
6 statement.

7 Q. Okay. Well, with regard to the Committee
8 driving the negotiations, I think that you testified
9 that from where you sat the Committee was going to end
10 up getting the funds ultimately anyway?

11 A. That's right. Yeah. That was my view. My
12 view was -- and that was, I think, everybody's view.
13 You know, that money was going to them. I may -- I
14 have opinions. I'm a lawyer. You can imagine I have
15 opinions. But I just didn't feel like I needed to
16 express strong opinions on the thing.

17 If somebody asked, I gave mine, with the
18 information I got from counsel and the financial
19 advisors, and I would give my opinion. And so I feel
20 I was heard. Don't get me wrong. I don't think I
21 wasn't heard on anything, but I said what I said.

22 Q. Given what you know about the Debtor's
23 financial status while it's here in bankruptcy, would
24 you agree that actually it's more likely that the
25 admin claims would get paid before the unsecured

1 creditors would get paid?

2 MR. MANN: Objection to form.

3 A. I don't know the answer.

4 Q. (By Mr. Strother) Okay.

5 A. I don't know the answer to that one. We all
6 know that the admin claims are given preference.

7 Q. Okay.

8 A. I mean, that's not rocket science in
9 bankruptcy.

10 Q. Okay. So do you know how the Committee
11 handled the situation where the Committee was driving
12 negotiations but Cole Kepro was a member of the
13 Committee?

14 A. I don't.

15 MS. MILLER: Objection to form.

16 Q. (By Mr. Strother) And I don't want to hide
17 information from you. Mr. Cook testified yesterday
18 that he recused himself from any decision that had to
19 do with the 9019. I'm wondering if you have any
20 information about that, in support of that, contrary
21 to that?

22 A. No. The answer no.

23 MS. MILLER: Objection to form.

24 A. The answer is that Cole Kepro, being a
25 driver of the -- or being a major role player on the

1 Unsecured Creditors Committee, as well as getting this
2 transaction, this joint motion done, was shocking, to
3 say the least, right? But as you know, you can be
4 shocked in bankruptcy.

5 But I think, I guess what I would say about
6 it is that, because of that, everybody was more
7 conscious of making sure that the I's were dotted and
8 the T's were crossed, right? Because while it's
9 allowed, you know, in this bankruptcy setting, I
10 certainly didn't want to be a part of a deal that, you
11 know, smelled at all.

12 And I -- and I had this conversation with
13 Fox, you know, my attorneys at Fox. We have to make
14 sure, you know, that you can't take advantage of this.
15 You know what I mean? And we have to make sure
16 everybody needs to pay attention. And I believe
17 people were.

18 Q. (By Mr. Strother) What's your understanding
19 of the relevance of Cole Kepro's insurance policy
20 that's referenced in the 9019 motion and its
21 attachment?

22 A. So it's all components of a deal, right?
23 That's all it was. And so you -- you had a priority
24 claim from Fifth Third Bank, right, that had senior
25 position. They're going to come to the table and

1 play, and you had the insurance policy that was out
2 there that needed to be triggered. You had a payment,
3 you know, that was going to come to the estate -- I
4 mean, they're just all components of the deal, right?

5 And so how all of that came together, I
6 expect was done in a lawyerly fashion and -- you know,
7 as with any settlement, somebody's got to give up a
8 little something. I mean, Fifth Third, as I
9 understand it, is not getting paid their full boat on
10 what they're owed by, you know, Cole Kepro. We're
11 getting what we're getting out of the transaction.

12 So, you know, you had multiple parties
13 coming together and lawyers and financial advisors who
14 put a deal together that made sense and accessed as
15 much money as could be accessed.

16 Q. Do you know what coverage Cole Kepro has
17 under that policy?

18 A. No.

19 Q. Meaning, is it a \$1 million, \$10 million,
20 something else?

21 A. 10 million sounds more right.

22 Q. Okay. I'll represent, again, to you that
23 yesterday Mr. Cook testified that should the 9019 be
24 approved and insurance company pay out on the bad debt
25 insurance policy claim, that Fifth Third Bank would be

1 made whole. Does that surprise you?

2 A. I mean, almost whole. They had a big
3 number. I mean, minus the 850-, we get the 850-,
4 that's -- I mean, you want to call that whole? I
5 mean, I don't know. It's 10 percent, right? A
6 10 percent haircut is my understanding of what Fifth
7 Third was going to take. If they come out whole, then
8 I don't know that.

9 Q. And he could be wrong, right, Mr. Cook?

10 A. I haven't seen the policy so I'm not going
11 to tell anybody they're --

12 Q. You haven't seen the policy?

13 A. No.

14 Q. Does the Debtor have any position on the
15 likelihood of the insurance company paying out on that
16 claim?

17 A. I believe that the -- that's a key component
18 of it, is that the insurance company is going to pay
19 out. I believe the insurance company is -- I believe
20 that's a done deal.

21 Q. Why do you believe that?

22 A. That's what I was told.

23 Q. So I want avoid trying to invade the
24 attorney-client privilege, but can you tell me who
25 told you that?

1 A. No.

2 Q. You can't?

3 A. No, I can't tell you who told it, because it
4 would invade the attorney-client privilege.

5 Q. Okay.

6 A. But, again, just on the broader scale, that
7 was a key component, that policy was going to pay,
8 that's where the money was going to come from.

9 Q. Have you seen any communications from the
10 insurance company that suggests that the insurance
11 company is going to pay the claim?

12 A. No.

13 Q. Have you seen anything that suggests the
14 insurance company knows about this aspect of the
15 transaction that's being proposed by the 9019 motion?

16 A. I haven't seen any communications with the
17 insurance company.

18 Q. Okay.

19 A. Cole Kepro's insurance company, I've seen
20 nothing.

21 Q. Okay.

22 A. I don't know anything about that insurance
23 company, what their position is on things, and
24 whatnot.

25 Q. Well, so how long have you been a lawyer?

1 A. Thirty years.

2 Q. Okay. I'm going to ask you what you think
3 of the following situation. Trying to dig into
4 your --

5 A. You want to have a little fun?

6 Q. I just want your thoughts here, because I
7 have my thoughts.

8 So the 9019 proposes a transaction where,
9 first of all, the Debtor and Cole Kepro have competing
10 ideas. The Debtor is saying, Cole Kepro sold me
11 defective equipment. Cole Kepro is saying, No, I
12 didn't; you owe me a lot of money.

13 Do you agree with me so far?

14 A. Yeah.

15 Q. But as part of that transaction, both of
16 those entities get something, right? Meaning, the
17 Debtor gets \$850,000. Cole Kepro, ostensibly, gets
18 paid out on an insurance policy, right?

19 MR. MANN: Object to form.

20 Q. (By Mr. Strother) So far so good? Meaning,
21 you agree with the way I'm summarizing it so far.

22 A. I accept what you said.

23 Q. And the way that both of those entities get
24 money in their pocket is because the insurance company
25 is told by Cole Kepro that the Debtor says that Cole

1 Kepro has a good claim, right?

2 MR. MANN: Object to form.

3 A. Okay.

4 Q. (By Mr. Strother) But in exchange for the
5 Debtor saying Cole Kepro has a good claim, the Debtor
6 is getting \$850,000 of the insurance company's money,
7 right?

8 MR. MANN: Objection to form.

9 Q. (By Mr. Strother) You're nodding your head.
10 You agree with me?

11 A. Yes, that would seem to be part of the
12 transaction.

13 Q. How is that situation different than two
14 people getting into a car wreck with one person
15 jumping out of the car and saying, This is totally my
16 fault, I was looking at my iPhone, I was doing TikTok,
17 I'm sorry I rear-ended you, but listen, I have amazing
18 insurance. If you'll just say it's your fault, I'll
19 be able to get an uninsured insurance claim and I'll
20 share it with you.

21 MR. MANN: Objection to form.

22 MS. MILLER: Objection to form.

23 THE DEPONENT: Linda, is that you? You
24 done? I'm supposed to wait.

25 Q. (By Mr. Strother) All the parties have an

1 agreement where an objection by one is good for all.
2 So once you hear one objection --

3 A. I'm not going to engage in that exercise.
4 And I will say that you and I, as you've been
5 practicing, I'm sure for --

6 Q. Twenty-five years, maybe twenty-six.

7 A. Twenty-five years. And deals get done how
8 deals get done. Exchanges are made, right? And so,
9 you know, while I understand it may be to your benefit
10 to make it sound shocking, that -- you know, with your
11 car example, you know, I'm not going to engage in it.

12 To me, it's a simple business deal. It's a
13 business transaction using the assets and tools that
14 people have to use to come to a resolution. That's
15 all this is. As far as I can tell. I mean, again,
16 maybe you can prove me wrong.

17 Q. I mean, you used the word something about
18 smell earlier, before I went into the questioning
19 about the way that the transaction looks to you. That
20 gave me my springboard to go where I went.

21 A. Oh, okay.

22 Q. Wouldn't you agree, though, that evaluating
23 the likelihood that the insurance company is going to
24 pay out on that claim is important from the Debtor's
25 perspective?

1 A. Yes, I would agree.

2 Q. Meaning, if this were a 100 percent
3 likelihood, if there was something in writing where
4 the insurance company said, We've received the claim,
5 we've looked at the 9019 motion, all is hunky-dory.
6 As soon as Judge Nakagawa signs this, everyone gets
7 their money.

8 That would be good for the Debtor, right, as
9 far as the Debtor getting the deal approved?

10 MR. MANN: Objection to form.

11 A. I'm not sure I got that whole question.

12 Q. (By Mr. Strother) That was the situation
13 I'm asking a question about. A hundred percent
14 certainty that the insurance company is going to pay
15 out on the deal.

16 A. It would be nice, yes. I agree it would be
17 nice to have 100 percent certainty.

18 Q. Do you think the Debtor is living in that
19 world, though, that there's 100 percent certainty that
20 the insurance company is going to pay out on that
21 claim?

22 MR. MANN: Object to form.

23 MS. MILLER: Objection.

24 A. I believe that the relevant people -- that
25 would be Fox, that would be our financial advisors --

1 have evaluated that scenario and concluded that
2 there's a high probability of it getting done;
3 otherwise, we wouldn't have brought this motion.

4 Q. (By Mr. Strother) If the Debtor's advisors
5 had not actually done that level of diligence, would
6 you be concerned?

7 A. Sure.

8 MS. MILLER: Objection.

9 Q. (By Mr. Strother) I'll represent to you
10 that I deposed Mr. James in this room on October 24th,
11 and I'll read to you from his deposition transcript to
12 see if it makes a difference to you.

13 On Page 56, Line 5, I asked: "Have you
14 received any information from Cole Kepro regarding the
15 status of the insurance claim?"

16 Mr. James says, "Not to my knowledge, no.
17 I've received the policy."

18 "QUESTION: What did you do with the policy?

19 "ANSWER: I reviewed the policy.

20 "QUESTION: For what purpose?

21 "ANSWER: As part of my assessment of the
22 asset and its relevance to the settlement.

23 "QUESTION: What did you determine after
24 reviewing it?

25 "ANSWER: I, along with the team at

1 Province, our assessment was the asset exists, and
2 along with the other assessments of the larger
3 settlement, that it was an asset that could be
4 incumbered by a promissory note for 850,000 with an
5 intercreditor agreement in place and was a viable path
6 forward to monetize the asset of the claims against
7 Cole Kepro is probably the best way to put.

8 "QUESTION: Did the Debtor do anything --
9 did you do anything other than review the policy to
10 confirm that to reach that conclusion that it was a
11 viable path forward?

12 "ANSWER: I guess when I say my review of
13 the policy, I didn't simply just, you know, read the
14 words on the page. I took into account what the
15 policy was for and applicability of that particular
16 asset of Cole Kepro's to the settlement.

17 "QUESTION: Did you happen to ask Cole Kepro
18 for communications between Cole Kepro and the insurer?

19 "ANSWER: That is not a request that I'm
20 aware of, no."

21 So if Mr. James is speaking for Province,
22 would you agree that Province has done nothing else
23 other than look at the policy and determine that the
24 policy should be applicable to that insurance claim?

25 MR. MANN: Objection to form.

1 MS. MILLER: Object to form.

2 A. Well, the words were words that he said.
3 But it seems to me that they evaluated what the policy
4 covered, what they thought they could get from it, and
5 there was a likelihood that that policy would end up
6 covering the Fifth Third -- remember, you've got Fifth
7 Third in here, too, right? This bank that has to --
8 that has to give up a piece of its recovery, right?
9 Because the -- as I understood it, the debt was higher
10 than the insurance policy. So the Fifth Third debt
11 was senior in position, and they had to -- Fifth
12 Third, the bank, was going to have to take a haircut.

13 So I would -- my conclusion was that, not
14 only did Province do what you just -- what Tanner just
15 said and evaluate the policy and belief that there
16 would be a recovery, but Fifth Third also believed and
17 did some evaluation. I'm making an assumption without
18 knowledge, so I'm not sitting here telling you I
19 talked to Fifth Third and had any discussions with
20 their counsel or their people. But we wouldn't come
21 up with this deal if Fifth Third didn't think they
22 were going to recover, right?

23 So you had various indicators that people
24 had evaluated the policy, and that there was a strong
25 likelihood that you were going to recover from it.

1 Q. (By Mr. Strother) Well, Fifth Third could
2 still do the deal and have the insurance claim not pay
3 outright, because they're only releasing their lien to
4 the \$850,000 on the insurance proceeds. They're not
5 subordinating anything else, right?

6 A. That's right. As I understand it.

7 MS. MILLER: Objection.

8 Q. (By Mr. Strother) If the insurance policy
9 doesn't pay out, Fifth Third is in no better -- no
10 worse shoes vis-a-vis the Debtor, right?

11 MR. MANN: Objection to form.

12 MS. MILLER: Object to form.

13 A. I'm not sure I understand the question.

14 Q. (By Mr. Strother) Fifth Third has a more
15 senior interest in Cole Kepro's assets --

16 A. That's right.

17 Q. -- than the Debtor does, right?

18 A. They have the senior interest.

19 Q. Okay. And so, absent this one carveout and
20 the attachment to the 9019 motion, which applies only
21 to the proceeds from the settlement, Fifth Third is
22 giving nothing out to the Debtor, right?

23 MR. MANN: Objection to form.

24 MS. MILLER: Object to form.

25 A. Fifth Third is the senior lender. They

1 already gave. They're not -- so there's nothing else
2 they're giving. They've funded their loan and they're
3 trying to collect on it. So that's where I'm
4 confused.

5 Q. (By Mr. Strother) So what happens to this
6 deal if it's approved and the insurance company
7 doesn't pay?

8 MS. MILLER: Object to form.

9 A. We get, I believe, an unsecured claim for an
10 additional 850,000.

11 Q. (By Mr. Strother) Which would be junior
12 to -- 100 percent junior to Fifth Third, right?

13 A. Yeah, I mean, I'm going to have to accept
14 you as the bankruptcy expert. I'm going to have to
15 accept what you say as what the rules are. But, like
16 I said, just enough to get into trouble. So I
17 couldn't answer that question for you as to how the
18 law would apply to Fifth Third in a Cole Kepro
19 bankruptcy.

20 Q. Okay. We may have gotten a little far off
21 the beaten path, and while I appreciate the
22 compliment, I should tell you, I'm not a bankruptcy
23 expert.

24 A. Fine.

25 Q. What I am trying to get you, on behalf of

1 the Debtor, to concede, number one, is that there's a
2 chance that the insurance company will not pay out on
3 the claim.

4 A. Sure.

5 Q. Okay.

6 A. I concede that. Whatever, however small
7 that chance may be, one percent. I mean, it's not
8 done, right? Until it's done, it's not done, so...

9 Q. And you picked one percent for illustration
10 purposes, correct? You don't know what the chance is
11 right now?

12 A. Correct.

13 Q. Okay. And as you sit here today, you don't
14 know what the insurance company knows at all, right?

15 A. I have no -- I can tell you that I have had
16 no communications with the insurance company. I have
17 relied on Province and Fox for their assessments of
18 that policy.

19 Q. Do you know whether anyone at Fox has spoken
20 to the insurance company?

21 MR. MANN: Objection to the form.

22 A. I don't.

23 Q. (By Mr. Strother) Let's go back to the
24 negotiations, and I may have already told this enough,
25 but I want to make sure I'm not missing anything.

1 You already told me that you couldn't -- by
2 phone call, email, participant -- tell me how the
3 negotiations unfolded between end of June and some
4 point late summer, but can you tell me who proposed
5 the general structure of the deal?

6 And by "general structure" I mean, the Cole
7 Kepro claim as allowed by the Debtor, money goes from
8 Cole Kepro to the Debtor, and Cole Kepro gets money
9 from the insurer to secure that promise to pay that
10 sum from Cole Kepro to Cash Cloud, the Debtor?

11 MR. MANN: Object to form.

12 MS. MILLER: On behalf of the Committee, I
13 would object only to the extent it calls for the
14 substance of communications between the Debtor and
15 Committee with respect to a common interest privilege.

16 Q. (By Mr. Strother) So I'm not looking for
17 substance at this moment.

18 A. What was the question again? Was it a time
19 question or a who question?

20 Q. Who.

21 A. Okay.

22 Q. Who generated, conceptually, the structure
23 of the agreement?

24 A. Okay. The answer is I don't know. I don't
25 know the answer to that question. I know that -- what

1 I can tell you is that I was on a telephone
2 conference, where I first heard about this, with the
3 unsecured creditors' counsel, with my counsel, with my
4 financial advisor.

5 So nobody in that conversation took credit
6 for or authorship for the deal. It was, Dan, we need
7 you to get on this call. We went your, you know,
8 opinions on this, and this is -- these are the things
9 we're looking at, these are the things we need to
10 weigh.

11 I think Chris McAlary had made a proposal at
12 some point in that -- I mean, I remember that, that
13 was always there -- his proposal of buying the
14 litigation. It wasn't just Cole Kepro.

15 And that's the other thing you have to
16 incorporate when you're evaluating these things is, it
17 wasn't apples to apples. He wasn't just saying Cole
18 Kepro, right, he's saying, I want all the litigation.
19 And so evaluating that versus what other step was on
20 the table.

21 So we talked about all of those things at
22 that time in the late summer, and like I said -- so
23 the answer to your question is no, I don't know who
24 had authorship of the deal. I expect that, like
25 lawyers do, everybody tries to get creative and come

1 to the table and figure out what is going to work best
2 for everybody involved, right? Everybody's got their
3 own interests and focus.

4 Q. Let me ask you to look at Paragraph 8 of
5 Exhibit 1.

6 A. Yeah.

7 Q. You declare there that, "It is likely that
8 CKI would be forced to commence its own bankruptcy
9 proceedings." Correct?

10 A. That's what it says.

11 Q. Okay. Why do you say that in the
12 Declaration?

13 A. I was told that.

14 Q. Okay. I'll represent to you that I -- the
15 attorneys probably picked up on it yesterday. I read
16 that. I didn't tell Mr. Cook what I was reading, but
17 I read it, and asked him, Is it likely that CKI is
18 going to declare bankruptcy if the deal doesn't go
19 through? And he said, No, it is not likely.

20 A. That was yesterday.

21 Q. That was yesterday.

22 A. Okay.

23 MS. MILLER: Object to form.

24 A. I don't know what his position was six
25 months ago.

1 Q. (By Mr. Strother) Fair enough.

2 A. And I do know that what I can tell you is
3 that Province had spoken with the sponsor of Cole
4 Kepro, who said -- and this I do remember -- who said,
5 I'm not putting any more money into this Cole Kepro
6 thing, so, you know.

7 Q. I'm sorry. I didn't hear who you said said
8 that.

9 A. Province.

10 Q. Okay.

11 A. And I believe it was Dan Moses who I was
12 talking to at the time who said he had spoken to the
13 sponsor, the Cole Kepro sponsor. You know what I mean
14 by that, the financial backing behind Cole Kepro.

15 Q. Sure.

16 A. And Dan said, they're not going -- whoever
17 that was. I thought it was one guy; you said it's
18 two. In our conversation -- doesn't matter. I mean,
19 I'm only telling you I understood it to be one sponsor
20 behind Cole Kepro, and that that sponsor had said, I'm
21 not going anymore. I'm not putting any more money
22 into this thing, into this Cole Kepro thing. Meaning
23 bankruptcy. So that was where I drew that conclusion.

24 Q. Okay. If Cole Kepro's financial situation
25 was bad but now it's better such that Mr. Cook is

1 testifying under oath, number one, that Cole Kepro was
2 not likely to declare bankruptcy, and number two -- he
3 also testified to this -- that Cole Kepro has never
4 threatened bankruptcy and is not preparing for
5 bankruptcy, shouldn't that change the Debtor's
6 evaluation on the collectability of a judgment from
7 Cole Kepro?

8 MR. MANN: Objection to form.

9 MS. MILLER: Object to form.

10 A. Yeah, I mean, if somebody is saying they're
11 bankrupt, and you have information that would verify
12 that, which we had six months ago, right, from, you
13 know, people speaking to each other and who have
14 information -- I mean, I have no reason to believe Dan
15 Moses would lie or mislead me. I don't believe -- and
16 I don't believe whoever he spoke to lied or misled
17 him. Maybe people take positions, and -- you know, we
18 all understand that.

19 But the bottom line is, if Cole Kepro is not
20 in a bankruptcy scenario, if their financial strength
21 is, you know, better and stronger -- and, again, what
22 does that mean, right? I mean, real strength, right?
23 Certainly you would reevaluate that collectability
24 component of your analysis, right?

25 If you think you can't collect, you know,

1 10 million bucks, that's different. I don't know that
2 it would be different at 3 million, 850- versus
3 3 million. I mean, you know what you got to do to go
4 through that. You got to pay a lot of lawyers' fees,
5 and I just don't -- again, I guess all I'm saying is,
6 if you tell me there are new facts, then of course I
7 would consider new facts.

8 I don't know that I would change my view or
9 opinion or conclusions on what deal I approached or
10 what have you. But I would say that I would be stupid
11 not to consider new facts. I would consider myself
12 stupid. So I would consider new facts if they were in
13 play.

14 Q. If you had access to Mr. Cook's deposition
15 testimony, would you review it for the purposes of
16 ascertaining what Cole Kepro was saying under oath its
17 financial position really is?

18 A. I don't know that would change a lot.
19 Again --

20 Q. My question is --

21 A. -- that is one component. What you're
22 focusing on is one component, which is
23 collectability --

24 Q. Right.

25 A. -- which I have acknowledged to you was a

1 major factor, at least in my analysis, and after
2 getting everybody's advice, you know, I did not assess
3 collectability myself. I don't have the data or the
4 information. I trusted the people who did have the
5 data and information and say, It's uncollectible.
6 Okay.

7 If I had information that said that you
8 could collect, you know, a big chunk of this money,
9 then I would obviously have to consider that, right?
10 And when you asked me would I consider his
11 deposition -- yeah, you know, that doesn't mean a lot
12 to me, what his deposition testimony is.

13 Q. Why not? Why not? Because you earlier said
14 that you don't think anyone at Cole Kepro -- I think
15 you said you don't think anyone at Cole Kepro would
16 lie about the situation, and I don't know that. Why
17 do you know that they wouldn't lie to save their
18 company to get this deal done?

19 MR. MANN: Objection to form.

20 A. I believe everybody is going to act in their
21 own interest, okay? So I didn't say I don't believe
22 Cole Kepro would not lie. I didn't say that. And if
23 I did say that, then, I'm taking it back, because
24 that's not my position. People will say whatever they
25 need to say at the time.

1 I had independent verification from Dan
2 Moses, who spoke with the Cole Kepro's sponsor, the
3 money guy behind Cole Kepro, at least that was my
4 understanding. So what Cole Kepro was saying was
5 consistent with the conversations I'd been informed
6 about.

7 Again, if new information comes to light,
8 credible information, I would obviously consider that
9 and make the necessary evaluation, but that has not
10 been given to me.

11 So the fact -- and so you asked me, does the
12 fact that Paul Cook said Cole Kepro is not going
13 bankrupt, and we have no plans or any of that. No.
14 Give me the financials. Okay. If you give me the
15 financials, then -- or if Dan Moses or Brett Axelrod
16 or somebody here gets the financials and has clear
17 information, right, data, not what somebody says in a
18 deposition, but data, then, yes, I would certainly
19 consider that.

20 Q. (By Mr. Strother) Well, I'll throw one more
21 out there to see if you've been made aware of it.

22 Have you been made aware of any of
23 Mr. Cook's testimony?

24 A. No.

25 Q. Okay. Would it surprise you to learn that

1 Cole Kepro -- he testified that Cole Kepro has paid
2 off \$10 million of loans since the bankruptcy?

3 A. Since what bankruptcy?

4 MS. MILLER: Object to form.

5 Q. (By Mr. Smother) Since Cash Cloud's
6 bankruptcy.

7 A. I didn't know that.

8 Q. Given what I'm representing to you as
9 Mr. Cook's testimony, and given your testimony that
10 you're privy to what Cole Kepro's financial status was
11 six months ago, would you agree that it would behoove
12 the Debtor and the Debtor's professionals to
13 reevaluate with fresh eyes and fresh information what
14 Cole Kepro's current financial status is to find out
15 if the deal proposed in the 9019 motion actually is in
16 the Debtor's best interest?

17 MS. MILLER: Object to form.

18 A. I don't know about that, okay? You cut a
19 deal based on certain things that existed at the time
20 of the deal, which you thought you knew -- I mean,
21 everybody did their own investigation, right,
22 everybody got their own facts. They did the best they
23 could to get the best information possible to make a
24 deal, and so you made a deal.

25 So do you come back now that you've made the

1 deal, because you made the deal at the time that there
2 was an axe hanging over your head, right? Because
3 Paul Cook, now that he's got this deal --

4 Q. (By Mr. Strother) I won't concede that.

5 A. Fair enough. You don't have to concede
6 that.

7 All I'm saying is, the deal that was made at
8 that time was made with everybody's threats and
9 positions taken. And the fact that he's paid off
10 10 million now, it may be that he knows that this --
11 that this thing -- one of these issues is gone, or
12 other issues in his world gone, right? And so now
13 it's worth it for him to put 10 million in and pay off
14 Fifth Third Bank. But that doesn't mean that he
15 wouldn't have -- he wouldn't have gone bankrupt back
16 when we cut the deal, right?

17 So what you're saying is, do I want to go
18 redo the deal now that there's -- yeah, it would be
19 great to go redo the deal.

20 Q. Why can't you? I think you said it's a done
21 deal, but it's not a done deal, right? You have to
22 seek the court approval, true?

23 A. We filed a motion.

24 Q. And, in fact, you have a Declaration in
25 front of you right now --

1 A. Right.

2 Q. -- that says Cole Kepro is likely to declare
3 bankruptcy, and I'm telling you the CEO testified
4 under oath yesterday that they're not likely to
5 declare bankruptcy.

6 How are you going to support the 9019 motion
7 with a Declaration based on old information?

8 MR. MANN: Objection to form.

9 A. It was true at the time it was --

10 MS. MILLER: Object to form.

11 Q. (By Mr. Smother) Well, did you have a sworn
12 statement from Mr. Cook that it was true?

13 A. No.

14 Q. You heard through the grapevine that someone
15 was making threats --

16 MS. MILLER: Object to form.

17 Q. (By Mr. Smother) -- right?

18 A. Of course.

19 Q. Well, and then he denies making the threats
20 under oath.

21 MR. MANN: Objection to form.

22 MS. MILLER: Objection.

23 Q. (By Mr. Strother) So I'm -- I understand
24 you're not --

25 MS. STROTHER: Guys, I'm sorry. I know

1 you're having to talk over each other, and there's a
2 slight delay. But I think that Mr. Mann is objecting
3 to form to every single one of these questions, but --
4 you're not bugging me. I just wanted to let you know
5 that if you're worried that the objections aren't
6 getting in, that they are.

7 MS. MILLER: I know. We can both make
8 objections.

9 MR. STROTHER: Okay.

10 Q. (By Mr. Strother) My point to you,
11 Mr. Ayala, is, why does it matter that it was true
12 when you signed that if we're going to have a hearing
13 on November 28th where Judge Nakagawa is going to be
14 asked to consider sworn -- or declarations or direct
15 testimony? That may not be good direct testimony
16 anymore, right?

17 MR. MANN: Objection to form.

18 MS. MILLER: Object to form.

19 A. It was good at the time. It's dated. It's
20 file stamped. It was good at the time.

21 Q. (By Mr. Smother) I'm not accusing you of
22 being wrong at the time. You might have been wrong,
23 but that's not my point.

24 A. I understand what your point is, but I'm
25 here to answer factual questions for you. I'm not

1 here to engage in a -- in a question of whether I
2 could change my testimony. My testimony is what it
3 was at the time, and I've told you what I think, and
4 so -- you know, this is what he has in front of him.

5 I presume you were bringing, you know,
6 whatever motions or moves you think are right to
7 bring, given Mr. Cook's testimony and all that. I
8 can't speak to that. I wasn't here for Mr. Cook's
9 testimony. I can only speak to what I said and what I
10 knew at the time.

11 Q. Well, our position -- and this is a
12 question -- our position is that the factors that
13 Judge Nakagawa has to look at when deciding whether to
14 approve the 9019 motion or not aren't when the motion
15 was filed. Good grief. This could have been a motion
16 that was filed back in March. It could have been
17 filed, like, right after the bankruptcy, and it's been
18 sitting there on the court's docket because we've been
19 agreeing to extend it so we can conduct discovery.

20 My question is, why won't you, on behalf of
21 the Debtor, having heard what Mr. Cook said about the
22 condition of Cole Kepro, at least take a look at it
23 when deciding whether or not the Debtor still wants to
24 seek approval of the 9019 motion?

25 MR. MANN: Objection to form.

1 MS. MILLER: Object to form.

2 A. So, first of all, the assumption built into
3 that is that we wouldn't take a look at it. Of course
4 we would take a look at it. As I said, as new
5 information comes available, you always consider it.

6 Nonetheless, we cut a deal that was the deal
7 at the time that was available to us, which everybody
8 signed onto, right? And so what you're suggesting is
9 that I back out of the deal, right? And maybe that's
10 appropriate, and I will get good advice from my
11 lawyers and financial advisors on what is the
12 appropriate thing to do in these circumstances.

13 But none -- what you're not acknowledging in
14 your question is that that deal was cut with the
15 circumstances that were existing at the time. And,
16 you know, it's always nice -- it would be great if we
17 could go change the deal every time new circumstances
18 come up, right? That would be a wonderful thing, but
19 you don't always get to do that.

20 And if it's available to us, if it's best
21 for the estate, if it's best for the -- you know, the
22 UCC or the rest of the creditors of this estate, then
23 by all means, I expect Brett and Daniel and the rest
24 of the crew, and Province to advise me of that and do
25 the right thing. That's what we'll do.

1 Q. (By Mr. Strother) Okay. Are you familiar
2 with the term in the proposed settlement agreement
3 that has the Debtor releasing all claims upon court
4 approval as opposed to when the promissory note is
5 actually paid?

6 A. I do recollect that.

7 Q. Does that give you pause?

8 A. Yeah, I mean --

9 MS. MILLER: Objection.

10 A. -- do I like every provision in this deal?
11 No. Is it the perfect deal? No. I mean, so when you
12 raise a -- when you raise an issue, right, of a
13 giveaway that we had, right, or what have you, you
14 know, you can -- you can go down a list of things that
15 I didn't like about the deal, right?

16 And what I mean by that is, it's not -- it
17 wasn't, you know, it wasn't the perfect deal. But it
18 was the best deal we could get at the time for the
19 asset given the circumstances that were in place. And
20 so that's all I'm saying.

21 All I'm saying is, you know, did I want to
22 give that, did I want to give that? No. I may not
23 have wanted to give that, but, you know, I got what I
24 got.

25 Q. (By Mr. Strother) What was the rationale

1 for giving that?

2 A. What?

3 MR. MANN: Objection to form.

4 Q. (By Mr. Strother) The release to Cole Kepro
5 the moment Judge Nakagawa signs the order as opposed
6 to after actually receiving payment from the
7 promissory note?

8 A. You're assuming --

9 MS. MILLER: I'm going to object -- sorry.
10 I'm going to just object to the extent that it calls
11 for substance of an attorney-client communication
12 subject to the common interest privilege.

13 MS. STROTHER: Okay.

14 A. Yeah, you're assuming that that was a give
15 for something else, and that is not the assumption you
16 should make.

17 The deal was presented to me as is with all
18 terms. So I looked at all of those things and made an
19 evaluation and took the advice of folks who said this
20 is -- this is the best we can get.

21 So we didn't go down the list and say, Oh, I
22 gave this for that, we gave this for that. That
23 wasn't the conversation that I had.

24 Q. (By Mr. Strother) Would you know the
25 rationale for why the director agreed to release those

1 claims upon signing of the order as opposed to later?

2 A. I don't have any recollection of having that
3 conversation.

4 Q. All right. Could I ask you to look at
5 Paragraph 9 of Exhibit 1?

6 A. Yep.

7 Q. You seem to be comparing CKI's purchase of
8 the claim with the Debtor having to actually litigate
9 the claim if CKI doesn't purchase it, right?

10 A. I didn't --

11 MS. MILLER: Object to form.

12 A. I didn't understand the question.

13 Q. (By Mr. Strother) Let me see if I can draw
14 your attention to the specific language. My Exhibit
15 Share is slow, so I don't have it in front of me, but
16 I'll get there.

17 So Paragraph 9 you write, you declare,
18 "Absent a settlement, the Debtor and CKI would likely
19 be embroiled in substantial, time-consuming and
20 expensive litigation, the result of which is
21 uncertain." Right?

22 So on one hand you're saying -- did I read
23 that correctly?

24 A. Yes.

25 Q. On one hand you're saying settlement. And

1 if no settlement, on the other hand, litigation,
2 right?

3 MR. MANN: Objection to form.

4 Q. (By Mr. Strother) You want me to ask it a
5 different way?

6 A. I'm not sure what the question is.

7 Q. So I'm wondering why, instead of comparing
8 the settlement to the embroiled litigation that's
9 going to be time-consuming, why you're not comparing
10 this settlement with the proposal made by McAlary,
11 because there's another way out of the litigation,
12 right? And that's McAlary's offer.

13 MS. MILLER: Object to form.

14 A. Yeah, okay.

15 Q. (By Mr. Strother) So I'm wondering why, in
16 Paragraph 9, you chose to assume that if this
17 settlement reflected in the 9019 motion isn't approved
18 that the Debtor was going to be left having to
19 litigate the claims against CKI as opposed to being
20 able to sell it to Mr. McAlary?

21 A. So that would have been --

22 MS. MILLER: Object to form.

23 A. That would have been one of the paths,
24 right? You could sell it to McAlary, right? And,
25 again, we're talking about apple to apples and oranges

1 to oranges, and we didn't have apples to apples and
2 oranges to oranges. So one of McAlary's provisions
3 was, you couldn't do this analysis that you want to
4 do, which is, Hey, we just sell it to Chris, right,
5 because you're selling to other pieces of litigation
6 to him, right? There were other factors in that deal.

7 And so when you asked me to compare, you
8 know, we would just give this litigation to Chris,
9 well, that wasn't all the terms. I mean, go through
10 the terms of the McAlary deal, too, okay?

11 Q. (By Mr. Strother) Let's do that.

12 A. I mean -- and so you're going to see that it
13 wasn't apples to apples, right? And so what you end
14 up seeing is the offer by Cole Kepro compared to the
15 offer by McAlary had different provisions and stuff
16 that wasn't even similar, okay?

17 And so, for me, I took the advice of the
18 lawyers and the financial advisors on which was the
19 better deal, okay? And so that is the best answer I
20 can give you to that question. So yes, we could have
21 sold to McAlary. He could have incurred those
22 litigation costs, and they wouldn't be there. But you
23 also were getting these other components -- you're not
24 factoring in the other components of the McAlary deal,
25 right?

1 So on an absolute basis, yes. I understand
2 what you're saying. That question makes sense, but it
3 wasn't absolute, you know, there are different
4 factors.

5 Q. So let me, then, segue into the topic you're
6 bringing up. I may come back to Paragraph 9, but move
7 to Paragraph 10 for the moment, please.

8 You list two reasons there why the Debtor
9 did not accept Mr. McAlary's offer, right?

10 A. Yep.

11 Q. Okay. The first one you wrote was the
12 Debtor, "...decided against it because it was for the
13 purchase of multiple litigation claims that valued the
14 claims much less than possibly settling them
15 separately." Did I read that correctly?

16 A. Yes.

17 Q. Can we call that Reason A for the moment?

18 A. Okay.

19 Q. Was the Reason A what we were just talking
20 about or what you were testifying about regarding
21 apples and oranges?

22 A. True.

23 Q. Okay. You go on to declare, "Also, another
24 factor that was considered is there is a current
25 derivative claim against Chris McAlary. Any purchase

1 of the litigation claim could impact the
2 collectability of that particular judgment." Did I
3 read that correctly?

4 A. Yes.

5 Q. Can we call that Reason B?

6 A. Sure.

7 Q. All right. Let's stay with Reason A for the
8 moment.

9 Is it your testimony that Mr. McAlary has
10 never offered to buy the Cole Kepro litigation, that
11 is the litigation that Cash Cloud has against Cole
12 Kepro, he's never offered to buy that independent from
13 the other litigation claims that Cash Cloud has?

14 MR. MANN: Objection to form.

15 A. I don't recall.

16 Q. (By Mr. Strother) Okay.

17 A. I mean, if there's an independent offer -- I
18 mean, he and I had had conversations about this as it
19 was ongoing, and so part of that, right, part of that
20 was -- like I said, Fox was talking to Cole Kepro,
21 Moses, the finance guys was talking to those guys, I
22 was talking to Chris. I don't know if Brett was
23 talking to Chris at the time -- that's Brett Axelrod
24 of Fox -- and who was doing what.

25 But we were in discussions to, you know,

1 resolve these claims. And one of the challenges was
2 the lack of -- so one was the lack of specificity on
3 the offer, right, what claim you were purchasing for
4 exactly how much. And the other issue was this
5 outstanding liability of Chris to the estate, and I
6 don't know -- I know that the Unsecured Creditors
7 Committee was a driving force in believing that to be
8 the case, that there was this outstanding liability,
9 and that factored into their analysis in evaluating,
10 you know, claims.

11 And, frankly, it factored into our analysis,
12 too. I mean, you know, when we considered the offers
13 that was -- that was certainly a factor, this
14 outstanding liability that was purportedly out there
15 from Chris.

16 Q. My question was, is it your testimony that
17 Mr. McAlary never offered to buy the Cole Kepro
18 litigation independent from other litigation? And I'm
19 not sure I heard the answer. You may have -- it may
20 have been in there, but what is your testimony in that
21 regard?

22 A. The answer is I don't recall specifically,
23 but I know that he and I had conversations. And so,
24 if there was an offer in an email of some sort, then I
25 don't, you know, accept that it exists. Because I did

1 have conversations with him about the purchase of
2 these litigation claims and ways he could structure,
3 right --

4 I mean, that was the whole point of the
5 apples to apples thing. Chris and I talked about it.
6 I said, Look, this is your problem right now, you
7 know, is that you're saying this, and they want you to
8 say this. "They" being the financial advisors, et
9 cetera, et cetera.

10 And so we had those conversations. I
11 just -- the answer to your question is I don't recall
12 specifically if he did it or not.

13 Q. Could I ask to you look at Exhibit 5, which
14 I just uploaded.

15 (Exhibit Number 5 was marked.)

16 Q. Can you see Exhibit 5?

17 MR. MANN: It's uploading right now.

18 A. All right. So this is July 20th, Cash
19 Cloud, Re: Cole Kepro.

20 Q. (By Mr. Strother) Do you see that Exhibit 5
21 at the top, under the black box, is an email from Dawn
22 Cica to Brett Axelrod on July 20th, 2023?

23 A. Yeah.

24 Q. I'm going to lead you through this. Do you
25 see that email -- in that email, Ms. Cica writes,

1 "Brett, see the attached. As always, please let me
2 know if you have any questions or need any
3 clarifications."

4 A. I see it.

5 Q. Do you see that the attachment is a letter
6 from Ms. Cica to Cash Cloud in care of Ms. Axelrod on
7 July 20th?

8 A. Yes.

9 Q. If you'll scroll down to the bottom of that
10 first page of the letter, do you see that this
11 identifies -- by the way, take a look at that letter
12 real fast, please, and let me know if you agree that
13 it is an offer from an entity controlled by Chris
14 McAlary to purchase various assets from the Debtor.

15 A. CC BR Holdco, LLC, is the offeror, and they
16 appear to be offering \$650,000 plus 10 percent of the
17 net proceeds for the three pieces of litigation that
18 are listed there of 1, 2, and 3.

19 Q. Read it a little more closely, please, that
20 last paragraph. I'll just read it to you. Tell me if
21 I'm reading it correctly.

22 "The purchase price for the purchase of
23 assets related to the Cole Kepro litigation is
24 \$650,000 plus 10 percent of the net proceeds (as
25 defined below) of any recovery from any Cole Kepro

1 litigation received by the purchaser." Right?

2 A. Yeah.

3 Q. Okay. Then it says, "The purchase price for
4 the purchase of assets related to the software
5 litigation is \$125,000, plus 10 percent of the net
6 proceeds of any recovery from any software litigation
7 received by the purchaser." Correct?

8 A. I see it.

9 Q. So would you agree with me that this is an
10 offer from an entity controlled by Mr. McAlary that
11 breaks out what his offer is with regard to the
12 various pieces of litigation?

13 A. Yes.

14 Q. So do you know why, ultimately, Mr. McAlary
15 -- again, I'm asking if you know -- do you know why,
16 ultimately, Mr. McAlary -- pardon me. Thank you. I
17 do have another question about Exhibit Number 5.

18 Would you please turn to the last page of
19 Exhibit Number 5. Do you see the second-to-last
20 paragraph?

21 A. Yes.

22 Q. I'm going to read it aloud. Please let me
23 know if I read it correctly.

24 "The purchase price is contingent upon the
25 purchase of all the litigation; provided, however,

1 that purchaser will purchase the Cole Kepro litigation
2 on a stand-alone basis subject to the following
3 condition: Any purchaser of the software litigation
4 will enter into a common interest agreement and/or
5 similar agreement under applicable law on all issues
6 and all claims with purchaser and for the benefit of
7 purchaser's contingency counsel and will agree to
8 cooperate and coordinate with the purchaser regarding
9 the strategic pursuit of all the litigation claims."

10 Did I read that correctly?

11 A. Yes.

12 Q. That is undeniably an offer from Mr. McAlary
13 to purchase the Cole Kepro litigation independent from
14 the other litigation, true?

15 A. Right. Says what it says.

16 Q. Okay.

17 MS. MILLER: Object to form.

18 MS. STROTHER: Everyone, may I please have a
19 quick bathroom break, five minutes?

20 MR. MANN: Yeah, that's fine.

21 MS. STROTHER: Thank you.

22 (Recess from 4:05 p.m. to 4:17 p.m.)

23 Q. (By Mr. Strother) Would you look at
24 Exhibit 6, please?

25 (Exhibit Number 6 was marked.)

1 A. Okay.

2 Q. Do you see that the first page under the
3 black block is an email, again, from Ms. Cica to
4 Ms. Axelrod on August 2nd, 2023?

5 A. Yes.

6 Q. And the entirety of that email says, "Brett,
7 per Chris's discussion with Danny last night, here's a
8 purchase agreement for the three litigation matters."

9 A. Yes.

10 Q. Do you recall that conversation with Chris
11 on the evening of October 1st?

12 A. I recall having a conversation with him.

13 Q. I said October 1st. I'm sorry. Do you
14 understand that I meant August 1st?

15 A. Whatever the date was. I recall having a
16 conversation with him. As I mentioned earlier, I was
17 trying to discuss with him ways that he could clarify
18 his offer.

19 Q. Okay. And this is approximately ten or so
20 days after Exhibit 5 when Ms. Cica wrote the letter
21 that the Cole Kepro litigation could be purchased
22 standalone, correct?

23 A. Okay. I accept what you say.

24 Q. Do you recall telling Mr. McAlary on
25 August 1st that he should package the litigation offer

1 to be all -- package the purchase offer to be all
2 three pieces of litigation?

3 A. I don't recall that, no.

4 Q. If that's what Mr. McAlary testifies to,
5 would you disagree with him, or do you just not
6 recall?

7 A. I just don't recall what exactly we talked
8 about.

9 Q. Do you recall the Debtor's efforts to sell
10 the -- to settle the Bitaccess and BitCoin Depot claims
11 between July 28th and August 1st?

12 A. No. I don't recall anything about that at
13 all.

14 Q. Okay. Have you ever -- do you recall there
15 being a scheduled settlement meeting to which BitCoin
16 Depot and Bitaccess didn't show up to?

17 A. No, do not recall that at all.

18 Q. Okay. Do you recall that the offer that we
19 have been looking at that's composed in Exhibits 5 and
20 6 was actually accepted by the Debtor?

21 A. Don't recall that.

22 MS. MILLER: Object to form.

23 Q. (By Mr. Strother) Let me ask you, please,
24 to look at what I'm going to mark as Exhibit 7. I'll
25 let you know when I have it up there.

1 (Exhibit Number 7 was marked.)

2 Q. Okay. Exhibit 7 is uploaded. I am going to
3 ask you to read this from bottom to the top, and then
4 I'm going to ask you to look at another exhibit, and
5 then I'll have questions, okay?

6 First of all, though, looking at -- to make
7 sure we're looking at the same document, do you see
8 that at the top of the first page of Exhibit 7, it's
9 an email from Ms. Axelrod to Ms. Cica on July 28th,
10 2023?

11 A. Yes.

12 Q. Okay. And I'll just -- you're welcome to
13 read the other page -- in fact, so you don't think I'm
14 pulling the wool over your eyes, would you please read
15 all of Exhibit 7?

16 A. Okay.

17 Q. Okay. I'm going to start on Page 2, please,
18 at the very earliest email.

19 A. Okay.

20 Q. Am I reading this correctly?

21 On July 27th, Ms. Cica says to, among
22 others, Ms. Axelrod, "Brett, per our call and your
23 request, attached is the common interest agreement
24 referred to in the CC BR Holdco offer to purchase
25 litigation assets, which I transmitted to you the

1 afternoon of July 20th after you requested a
2 stand-alone bid with regard to the Cole Kepro
3 litigation (as defined in the offer.)" Did I read
4 that correctly?

5 A. Yes.

6 Q. Do you see right above that Ms. Axelrod
7 responds one minute later and just says, "Thank you"?

8 A. Yep. I see it.

9 Q. Do you see that on the following day, right
10 above that, Ms. Cica says to Ms. Axelrod, "Brett, I
11 assume this is understood, but I want to confirm that
12 any sale of the litigation pursuant to the auction
13 will be at 363 sale not subject to clawback."

14 A. I see it.

15 Q. Do you see, then, Brett responds -- I'm
16 sorry. Ms. Axelrod responds an hour and a half later,
17 "Should have draft to you no later than Monday."

18 A. Okay.

19 Q. And do you see Ms. Cica responds within ten
20 minutes, "A draft of....?"

21 A. Yes, I see that.

22 Q. And do you see that Ms. Axelrod responds
23 three minutes later, "Private sale motion"?

24 A. Got it.

25 Q. First of all, do you agree that this

1 indicates that the Debtor had accepted that offer and
2 had instructed Ms. Cica how to prepare the documents
3 to document the sale?

4 A. It says what it says.

5 MR. MANN: Objection to form.

6 MS. MILLER: Object to form.

7 A. It says what it says. I don't disagree with
8 anything it says. It's all in writing. It speaks for
9 itself, so -- yeah, it says what it says.

10 Q. (By Mr. Strother) And do you see that
11 Ms. Axelrod is even agreeing to be the one to prepare
12 the actual motion to approve the deal that's being
13 discussed here?

14 MR. MANN: Objection to form.

15 MS. MILLER: Objection.

16 A. It says what it says, right? So you want me
17 to answer your question. My answer to your question
18 is to say, "Should have draft to you no later than
19 Monday." That's what it says, right?

20 Q. (By Mr. Strother) Well, I'm going to go
21 more than just telling me that I'm reading it right.
22 We've already done that.

23 I'm asking you if you agree with my
24 interpretation, which is --

25 A. I'm not going to interpret it.

1 Q. Well, you're the Debtor, and this is your
2 attorney, right?

3 A. That's right.

4 Q. So did she have the authority to have this
5 conversation with the counsel for Mr. McAlary?

6 A. Sure.

7 Q. Okay. But as the Debtor, the one person
8 that gets to make decisions on behalf of Debtor, you
9 won't interpret whether or not this was an agreement
10 between your agent and the agent for Mr. McAlary?

11 MR. MANN: Objection to form.

12 A. It says -- I'm going to stick with what it
13 says. It says what it says.

14 MS. MILLER: Object to form.

15 Q. (By Mr. Strother) Do you know that Fox
16 Rothschild actually prepared the private sale motion
17 referenced here on Exhibit 7?

18 A. I don't recall.

19 Q. Give me a moment. I'm going to make another
20 exhibit, please. I found it. I'm now marking Exhibit
21 Number 8.

22 (Exhibit Number 8 was marked.)

23 Q. Could you please take a look at Exhibit
24 Number 8?

25 MR. MANN: It's just uploading it now.

1 MS. MILLER: I'm sorry. This is Laura
2 Miller on behalf of the Committee.

3 I just want to note that the exhibit stamp
4 on here is blocking out some of the text. I don't
5 know if we can get a revised version where the exhibit
6 stamp is not covering the email, but that would be our
7 preference.

8 MS. STROTHER: You know, I think the way I
9 can fix that is by making a new Exhibit Number 9.
10 Technologically, I don't know how to move it, but I do
11 know how to pay closer attention where I place it.

12 So let me make this August 4th email also
13 Exhibit Number 9. It will have the exhibit sticker in
14 a different spot.

15 MS. MILLER: Much appreciated.

16 MR. STROTHER: Okay.

17 (Exhibit Number 9 was marked.)

18 Q. (By Mr. Strother) Okay. I've now uploaded
19 Exhibit 9. Let's please look at that one. I will
20 represent, Mr. Ayala, that to the extent you are
21 reading Exhibit Number 8, it's identical to Exhibit
22 Number 9, except for where the sticker is, so you'll
23 be able to read a little bit more.

24 A. Okay.

25 Q. Mr. Ayala, I show Exhibit 9 to you to merely

1 ask that you let me know if you agree that this shows
2 that the parties, the Debtor and Mr. McAlary, were
3 finalizing the motion and all of the supporting
4 documents for the deal that we've been discussing over
5 the previous few exhibits?

6 A. That's what it appears to show, yes.

7 MS. MILLER: Object to form.

8 Q. (By Mr. Strother) Do you know what happened
9 next?

10 A. I don't recall.

11 Q. Are you aware that later on -- well, let me
12 strike that.

13 Is it true that after the Debtor provided
14 the proposed paperwork to counsel for Committee,
15 counsel for Committee indicated that it was going to
16 object to the proposed transaction?

17 MR. MANN: Objection to form.

18 A. I do recall that, yeah, I do recall.

19 MS. MILLER: Object to form.

20 Q. (By Mr. Strother) Do you recall that
21 subsequent to the proposed transaction that we've been
22 looking at over these past few exhibits that
23 Mr. McAlary actually increased the dollar value of his
24 offer for the CKI litigation?

25 A. I don't recall specifically.

1 MS. MILLER: Object to form.

2 Q. (By Mr. Strother) Let's look back at
3 Exhibit 5 so we can make sure we -- actually. I'm
4 sorry. Let's look at Exhibit 9. It should be in
5 there.

6 MS. MILLER: Are we looking at the same
7 exhibit? Thought we were looking at Exhibit 9.

8 MR. STROTHER: I directed him to Exhibit 5,
9 and then said never mind, let's go back to Exhibit 9.

10 So Ms. Miller, yeah, we are -- we are
11 looking at Exhibit 9.

12 MS. MILLER: Thank you.

13 Q. (By Mr. Strother) Okay. Mr. Ayala, will
14 you please turn to Page 9 of Exhibit 9. And that is
15 PDF Page 9 rather than the number that appears on the
16 page. Specifically, I'm asking you to look at
17 Paragraph 20.

18 A. Got it. All right.

19 Q. Okay. Do you see that Paragraph 20 says,
20 "Purchaser will pay the Debtor a purchase price of
21 \$750,000 plus 10 percent of the net proceeds,"
22 et cetera?

23 A. Yes.

24 Q. Okay.

25 A. I see it.

1 Q. I want to make sure you saw the 750,000
2 number because I'm going to show you another document
3 in a moment.

4 By the way, on the first page of Exhibit 9,
5 do you -- can you please lodge in your memory that
6 this happened on August 4th?

7 A. Okay. Yes, August 4th is on there.

8 Q. I am introducing Exhibit 10, and the sticker
9 will be in a very happy and pleasant place.

10 (Exhibit Number 10 was marked.)

11 Q. Okay. Exhibit 10 has been uploaded. Will
12 you let me know when you can see it?

13 A. I can see it.

14 Q. Okay. Do you agree that on Page 1 this an
15 email from Ms. Cica to Ms. Axelrod on August 21st?

16 A. Yes.

17 Q. And do you recall that the \$750,000 figure
18 was documented and document's dated August 4th,
19 correct?

20 A. Okay.

21 Q. Do you see that Ms. Cica writes, "Brett,
22 attached please find an updated offer by CC BR Holdco,
23 LLC, to purchase the estate's claims against Cole
24 Kepro for \$1 million and the estate's claims against
25 Bitacess and BitCoin Depot for \$200,000 as well as the

1 payment of the arbitration deposit in Canada of
2 261,389.14, Canadian dollars"?

3 A. I see it.

4 Q. So would you agree with me that as of
5 August 21st Mr. McAlary had offered \$1 million for the
6 Cole Kepro litigation?

7 A. I see it, yes.

8 Q. And --

9 MS. MILLER: Form.

10 Q. (By Mr. Strother) -- would you agree that
11 this being an updated offer, the concept that it was
12 meant to be received as standalone is manifest on the
13 face of these documents?

14 MR. MANN: Objection to form.

15 MS. MILLER: Object to form.

16 A. It says what it says. The document speaks
17 for itself.

18 Q. (By Mr. Strother) So this last offer from
19 Mr. McAlary on August 21st, you would agree that it's
20 for a sum of over \$1.4 million if -- strike that.

21 I don't know what a Canadian dollar is worth
22 these days, so I'm going to use the word
23 "approximate."

24 Would you agree that the offer made on
25 August 21st is for an entire sum of approximately

1 \$1.4 million?

2 A. Well, it says, one million for the estate
3 claims, 200,000 for Bitaccess and BitCoin Depot, and
4 the Canadian deposit of 261,389.14.

5 Q. So whatever that sum is? I was hoping to
6 use a round number.

7 A. Yeah. It says what it says.

8 Q. Did you evaluate that offer?

9 A. Sure.

10 Q. What was -- what did that evaluation entail?

11 A. I don't recall the specifics of it. I do
12 recall that a big issue was the bankruptcy of Cole
13 Kepro. That was a big issue driving -- driving
14 discussions was, Hey, it's great, you can have all
15 this, you know, 10 percent extra and all these other
16 things, but if it's going to -- if Cole Kepro is going
17 to go BK, you know, you get nothing out of it.

18 Q. I'm not -- I'm sorry. The Debtor wouldn't
19 get nothing in that situation, right?

20 A. Correct.

21 Q. It would still get the \$1 million for the
22 Cole Kepro from Mr. McAlary.

23 A. That's right. There's also the discussion
24 -- and you saw this in the prior emails about the
25 internal claims -- and I'm not using a term of art

1 here, but I may not be using the words properly -- but
2 there were claims that were going to be made against
3 McAlary, which would reduce the collection against
4 McAlary by the amount he would pay for this. So that
5 was a factor also.

6 Q. That's Reason B from your Declaration,
7 right?

8 A. Is that -- okay. I accept it. If you say
9 it, I accept it.

10 Q. I appreciate you saying that, but I want to
11 make sure that we don't accidentally misunderstand
12 each other. So can we go back and look at Exhibit 1,
13 which is your Declaration, and go to Paragraph -- I
14 believe it's 10?

15 A. Yeah. Derivative claim against McAlary.

16 Q. Okay. And so that's the second reason you
17 gave in Paragraph 10?

18 A. That was another reason that was factored
19 in.

20 Q. Okay. But as far as evaluating whether
21 \$1 million for the claim is more than \$850,000 from
22 Cole Kepro for the claim, was there any more
23 evaluation done on that front to compare those two
24 figures, or is it just as plain on the nose on my
25 face?

1 A. It wasn't plain at all. I mean, there were
2 different factors to be considered with different
3 offers. They weren't apples to apples, and so it was
4 difficult to make a clean, you know, assessment. You
5 couldn't just say a million bucks for McAlary now is
6 better than 850- from Cole Kepro.

7 Q. But for --

8 A. No.

9 Q. I mean, you could.

10 A. I'll finish my answer. I'll finish my
11 answer.

12 Q. Okay.

13 A. You couldn't just -- if you just took those
14 two components of the offers, then certainly you could
15 do that. But you had the Cole Kepro bankruptcy, you
16 had the McAlary claims, derivative claims that were
17 coming out, and how would that affect his net worth
18 and ability to pay on those derivative claims? What
19 about the unsecured claim that you got as a guarantee
20 if Cole Kepro went bankrupt, and what would the value
21 of that be? What about Fifth Third Bank?

22 I mean, there a lot of factors to consider.
23 And so the idea that you're posing me the question of,
24 Hey, isn't a million better than 850,000? Yeah, the
25 answer to that question is yes.

1 Now, add in all the other components and
2 factors of the two different offers and they're not.
3 And so I took the advice of my counsel and the
4 financial advisors, who are much smarter than me, as
5 you've already learned in this deposition that we've
6 had today, there are people smarter than me who gave
7 me advice on what the evaluation was and -- you know,
8 of course, I did my own, I understood it and concluded
9 -- and took their advice.

10 Q. Your humbleness is charming. I have not
11 noted that anyone is smarter than you in any form or
12 fashion. My question wasn't straight: Hey, one
13 million is better than 850,000.

14 My question began, what sort of evaluation
15 did you do of Mr. McAlary's offer, that specific offer
16 of \$1 million?

17 And so to make sure I've got the answer,
18 what evaluation did you do of that offer?

19 MR. MANN: Objection to form.

20 A. I spoke with my counsel and my financial
21 advisors as to what this offer meant, what the
22 derivative claims were, why that would be a factor in
23 evaluating this offer, and how important was that?
24 And the importance of the Cole Kepro bankruptcy and
25 that threat and how real it was, and I just -- I just

1 laid it out for a minute. I just said it. We -- I
2 evaluated all of those things, and the advice I
3 received was Cole Kepro was better. That's -- I don't
4 know how else to say it.

5 Q. (By Mr. Strother) Are there other factors
6 other than the ones in Paragraph 10 of your
7 Declaration that you believe support deciding against
8 Mr. McAlary's \$1 million offer?

9 MR. MANN: Objection to form.

10 MS. MILLER: Object to form.

11 A. I assume -- am I to understand what you're
12 asking me is, did I put everything in here that I
13 evaluated? Is there anything missing?

14 Q. (By Mr. Strother) No. That's not my
15 question. You gave a Declaration in support of the
16 9019 that says the Debtor decided against
17 Mr. McAlary's offer because, Reason A, it was for the
18 purchase of multiple litigation claims, and Reason B,
19 any purchase of a litigation claim could impact the
20 collectability of that potential judgment against
21 Mr. McAlary.

22 I'm asking you is there a Reason C?

23 A. Is there anything I left out? No.

24 MS. MILLER: Objection.

25 A. There's nothing I can think of that was left

1 out.

2 Q. (By Mr. Strother) You testified a moment
3 ago about --

4 A. I mean, I did say the Cole Kepro bankruptcy,
5 which is not one of the reasons listed, right?

6 Q. Sure. But why don't you explain to me why
7 that is a reason not to -- why is that a reason to
8 take Cole Kepro's offer rather than Mr. McAlary's
9 offer?

10 A. Because Cole Kepro can control their
11 bankruptcy. They can control whether they file or
12 not.

13 Q. But if Mr. McAlary purchases the litigation
14 against Cole Kepro, why would it matter to the Debtor
15 if the Debtor is getting that \$1 million?

16 MR. MANN: Objection to form.

17 A. You've got a 10 percent out there.

18 Q. (By Mr. Strother) Okay.

19 A. There's a 10 percent tail that is going to
20 presumably bring in more money into the thing. And if
21 you get zero out of that, then --

22 Q. You get one million?

23 A. That's right. That's right. But --

24 Q. That's the floor, right?

25 A. That's the floor, but there's the derivative

1 claims. You keep not acknowledging that.

2 Q. I've got a whole bunch of pages to discuss
3 the derivative claim, and I'm about to get there.

4 A. Okay.

5 Q. You're the one who brought up the
6 bankruptcy. I was about to move on to the derivative
7 claim.

8 A. Okay.

9 Q. You're testifying that Cole Kepro's
10 bankruptcy, which we now know from Mr. Cook is not
11 likely, but you're saying that that bankruptcy --

12 A. That threat.

13 Q. He testified that he never threatened, that
14 Cole Kepro never threatened.

15 A. The fact --

16 MS. MILLER: Object to form.

17 A. The fact that he testified to that --

18 Q. (By Mr. Strother) Under oath.

19 A. -- I don't dispute that, okay? I can tell
20 you what I knew, what I was told, okay? That's it.

21 So the fact that he testified to that, God
22 love him. That's not what I was told.

23 Q. Well, it's no secret -- you can tell from my
24 questions, I don't think you were told everything,
25 right? And so I'm asking what you were told and when

1 you were told, and telling you pieces that other
2 people have told us under oath to challenge and see if
3 maybe you're going to change your mind about
4 something, which is fair game in a deposition, right?

5 A. Right.

6 MS. MILLER: Object to form.

7 Q. (By Mr. Strother) I think I can move away
8 from the bankruptcy being a factor, unless you want to
9 discuss that anymore as far as why the \$1 million was
10 rejected -- for the moment.

11 A. You go wherever you want to go. I'm here to
12 give my best answers.

13 Q. Let's go to Reason B. Reason B in Exhibit 1
14 in Paragraph 10 are those last two sentences. Can you
15 tell me what you mean by those words?

16 A. So the only thing I can tell you about that
17 is, when I was initially hired, it was to be an
18 independent director and to evaluate his -- Chris
19 McAlary's internal transactions. In other words,
20 transactions between him individually and the company,
21 and to determine or make some sort of determination on
22 whether or not they all were arm's length
23 transactions, basically. That's essentially what
24 you're trying to accomplish, you know.

25 So that was where I was initially hired.

1 And there was a set of transactions that I was
2 presented with to the tune of several million dollars.
3 I don't remember the exact amounts because it quickly
4 went past that. That became -- that did not become --
5 that was the sole issue why I was in there for the
6 moment, and that quickly no longer was the biggest
7 issue. But it was there. And it was what the
8 creditors -- the UCC and everybody else was waving the
9 flag on, right, is these transactions.

10 Now, the bottom line is the money wasn't
11 there, right? So there was -- there was no money to
12 get. Now, I have no idea what Chris has, where he has
13 it, or whatnot. All I can see is the transactions,
14 right? Pursuing them is another thing.

15 All I'm saying is that was an issue out
16 there, was pursuing that money from Chris individually
17 for the benefit of the creditors of the estate.
18 That's what I looked at as the derivative claims. And
19 that's really all I paid attention to it, because you
20 were going to have to pay money to a litigator to
21 pursue collecting this money. You know what I mean?

22 This wasn't -- that wasn't top of my mind to
23 deal with was -- you know, some sort of derivative
24 claim against Chris McAlary. And if it was, it would
25 be somebody else, some other committee, the creditors

1 committee or what have you, right?

2 What was top of mind for me was collecting
3 as much money as possible for the estate. And so that
4 involved, really, the auction of the machines, that
5 whole process. Ms. Cica was there for that process.
6 And then thereafter, the litigation claims. That was
7 really the two big -- two big assets that seemed to be
8 of value that were being pursued and evaluated and,
9 you know, to get disposed of.

10 Q. Why are you saying that if Mr. McAlary
11 spends a million dollars to purchase the claim, which
12 goes into the pockets of the Debtor -- I'm using that
13 loosely.

14 A. Yeah, yeah.

15 Q. -- why does that somehow impact the
16 collectability of a potential judgment in the future
17 that the derivative holder of those claims is pursuing
18 against Mr. McAlary?

19 MR. MANN: Object to form.

20 A. So here's what was explained to me, which
21 was this. McAlary has a pot of money. Let's just say
22 it's -- use round numbers, just to use numbers. They
23 have no validity or anything for purpose of what we're
24 talking about.

25 Q. (By Mr. Strother) Understand.

1 A. I'm just putting some numbers to put them on
2 a table.

3 If McAlary has two million dollars to his
4 name, then we want -- "we" being the creditors or
5 whoever is pursuing that -- we want to get that
6 \$2 million, plus we want to get another million for
7 the sale of the Cole Kepro litigation, right? We
8 don't want to dissipate McAlary's two million having
9 spent one on the Cole Kepro litigation, and then we
10 can't get that, right? That was the explanation given
11 to me.

12 Q. So very early on in this deposition I asked
13 you questions about the Debtor's valuation of -- and
14 evaluation of the Debtor's claim against Cole Kepro.
15 I'm now going to ask you similar questions about the
16 Debtor's evaluation and valuation of claims against
17 Mr. McAlary.

18 Has the Debtor performed any independent
19 analysis of the likelihood of succeeding on claims
20 against Mr. McAlary?

21 MR. MANN: Object to form.

22 A. Not that I'm aware of.

23 MS. MILLER: This is Laura Miller on behalf
24 of the creditors. I'm sorry. Just before you answer,
25 Mr. Ayala, again, I would instruct you not to answer

1 to the extent it goes to the substance of
2 attorney-client communication subject to the common
3 interest privilege between the Committee and the
4 Debtor.

5 Q. (By Mr. Strother) Similar question. First
6 question was evaluation. What about determining the
7 value of claims levied against Mr. McAlary in a
8 derivative fashion by the Committee?

9 A. I haven't seen anything.

10 MS. MILLER: Same objection.

11 A. Yeah, I haven't seen any -- I've heard
12 numbers bandied about. Again, not something I focused
13 on because -- just wasn't something that I was going
14 to spend. I didn't see myself, you know, having to
15 spend time on that.

16 Q. (By Mr. Strother) As you sit here today, do
17 you have any idea what the probability is of a victory
18 against Mr. McAlary if those claims are fully
19 litigated?

20 MR. MANN: Objection to form.

21 MS. MILLER: Objection to form and same
22 objection regarding attorney-client privilege.

23 A. Well, I think I told him at the beginning
24 that -- or early on, that I would not able to pass --
25 meaning, approve or agree that the internal

1 transactions he engaged in with the company passed
2 muster. I hadn't reached a spot of concluding they
3 hadn't either. I mean, they were documented and, you
4 know, it was going to take a minute to go through it.

5 But there was -- there was certainly, you
6 know, something that I didn't want to -- one of my
7 things was, you know, I wasn't going to simply agree
8 that something was appropriate if I didn't think it
9 was appropriate, and I didn't feel comfortable taking
10 somebody's money, paying me as an independent
11 director, which -- with the goal of me agreeing, you
12 know, signing off on something that wasn't right.

13 So I had -- yeah, I mean, so I guess -- I
14 guess I had not reached a conclusion, but I had done
15 enough of looking at the -- what I saw as the
16 transactions to say that more needed to be done before
17 I could sign off on it, and I was concerned that I
18 couldn't sign off with Chris and about taking money
19 on -- you know, on a monthly basis when I'm supposed
20 to be doing this and, you know, clearly not getting to
21 the goal that -- I mean, it's just practically getting
22 to the goal that, you know, the guy who hired you to
23 get to.

24 But I also -- I can tell you that I hadn't
25 concluded that they weren't appropriate, either.

1 There was no -- but all I'm saying is I looked at it
2 enough to say, Okay, now I see why you need a
3 director. And certainly there were a bunch of people
4 yelling about -- yelling about this derivative, you
5 know, these derivative claims and this money that was
6 owed and all that. I hadn't drawn a conclusion.

7 I didn't come to a conclusion that it was or
8 wasn't appropriate that there was a probability of
9 collectability or not. I hadn't reached that point in
10 my analysis with respect to Chris's internal
11 transactions. And I just didn't -- once he moved out,
12 I was focused on selling the assets. I wasn't focused
13 on, you know, wanted to collect against Chris or
14 evaluate that or decide whether -- you know, here was
15 a pot of money to go after.

16 Q. (By Mr. Strother) Did you just say that you
17 hadn't evaluated the probability --

18 A. That's right.

19 Q. -- or you haven't evaluated the probability?

20 A. No, I haven't.

21 Q. Have not?

22 A. Of Chris's -- no. No, I haven't. I have
23 not focused on that. I hadn't -- hadn't come up
24 with -- again, I was not focused on chasing Chris down
25 to collect money. I think others were more focused on

1 that and, you know, God love them, let them go run
2 that -- run that route.

3 Q. You've used a couple of colloquial phrases
4 about people who were interested in pursuing claims
5 against Mr. McAlary.

6 A. Yeah.

7 Q. "Waving flags" and you used "yelling" once.
8 I'm accepting that as just --

9 A. Everybody. It's everybody. It was
10 everybody other than me.

11 Q. Okay. Donald Trump and President Biden?
12 Who's everybody? I mean, come on.

13 My question is -- who were the driving
14 forces behind wanting to pursue claims against
15 Mr. McAlary?

16 A. Everybody.

17 MR. MANN: Object to form.

18 A. Everybody. Everybody involved in the
19 bankruptcy. Go down your list of service people and
20 pick them. All right.

21 Q. (By Mr. Strother) Okay.

22 A. But everybody had some. I couldn't --

23 Q. Okay.

24 A. I personally couldn't understand it, but,
25 you know, everybody had a -- everybody thought he owed

1 money, let's put it that way. Everybody thought he
2 took money out that he shouldn't have taken out or
3 that he owed money, whatever.

4 Again, I did not need to focus on that.
5 That wasn't, you know, something I spent a lot of time
6 focusing on. And maybe I will have to at some point,
7 you know, down the road. But as this process goes
8 along, but -- you know, at this point, I haven't had
9 to focus on that. I told you what my experience is up
10 to this point, which is, I saw a set of transactions
11 and a set of documents and started the evaluation with
12 my counsel and financial advisor, and didn't reach a
13 resolution to what -- you know.

14 Q. Okay.

15 A. Other people had.

16 Q. Okay.

17 A. Other people had. Like said, the Province
18 folks, the counsel, Fox Rothschild, and the unsecured
19 creditors -- go down list. The lenders, you know,
20 everybody had reached a conclusion that he owed money
21 back and that that was -- and that was a big factor in
22 that analysis is we want to get -- if he's got this
23 pot of money, we don't want to dissipate it and give
24 him an asset. That was one of the factors that was
25 considered.

1 Q. Okay. At this point, I may bounce around a
2 little more than I have been. So if at any point you
3 don't understand my move or know that I have moved to
4 a new topic, please let me know if you're confused. I
5 don't think you're going to be confused, but let me
6 know.

7 (Exhibit Number 11 was marked.)

8 Q. First of all, would you please look at
9 Exhibit 11 that I just uploaded? Are you able to see
10 Exhibit 11?

11 A. Not yet.

12 Q. Okay. While it's loading, let me ask you --

13 A. All right.

14 Q. You have it?

15 A. Yeah.

16 Q. Do you see that Exhibit 11 is a letter from
17 Ms. Cica to Ms. Axelrod on November 8th, 2023?

18 A. Yeah, I see it.

19 Q. Have you seen this letter?

20 A. Yes.

21 Q. Okay. So, as you sit here today, you're
22 aware that Mr. McAlary, through counsel, has continued
23 to point out that he has made a \$1 million offer for
24 the Cole Kepro litigation?

25 A. Yes.

1 Q. And the reason --

2 MS. MILLER: Object to form.

3 Q. (By Mr. Strother) The reason I brought this
4 up, Mr. Ayala, is because I want to make sure that
5 you're aware of the last sentence as well, which is,
6 "At the request of the Debtor, such an offer was made
7 with the warrant that the purchaser would purchase the
8 claims against Cole Kepro even if Cole Kepro filed a
9 bankruptcy petition."

10 A. Yeah, I see it.

11 Q. So you understand that as you're giving your
12 testimony today?

13 A. I see it. I see it.

14 Q. Let me ask some questions again about the
15 Cole Kepro bad debt insurance policy.

16 I believe you testified that you've not
17 spoken to that insurance company, correct?

18 A. Yes.

19 MR. MANN: Objection to form.

20 Q. (By Mr. Strother) Have you spoken to anyone
21 else other than counsel regarding the status of that
22 insurance claim?

23 A. No.

24 Q. Have you spoken with anyone on behalf of
25 Fifth Third about the insurance policy or the claim?

1 A. No.

2 Q. Have you ever spoken with anyone on behalf
3 of Fifth Third?

4 A. No.

5 Q. Do you have concerns -- strike that.

6 Does the Debtor have a contingency plan on
7 what it will do if the insurance company does not pay
8 the claim to Cole Kepro?

9 MR. MANN: Objection to form.

10 A. I have not had any discussions on that
11 front -- or nothing of substance, let's put it that
12 way.

13 Q. (By Mr. Strother) Are you concerned about
14 any potential litigation that will be brought by the
15 insurance company against participants in this
16 transaction?

17 A. No.

18 Q. Has the Debtor done anything to minimize any
19 exposure to the insurance company should the insurance
20 company pursue any litigation claims against
21 participants to the claim -- the proposed settlement?

22 MR. MANN: Objection to form.

23 MS. STROTHER: Sorry.

24 A. Not that I'm aware of. There's nothing --
25 no plan that I've been involved in.

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1 Q. (By Mr. Strother) Shifting gears. I'll
2 represent to you that Mr. Cook testified yesterday
3 that he has been in contact with Cash Cloud employees
4 about the defect claims being -- that form the basis
5 of the claims against Cole Kepro. Do you have any
6 knowledge of that?

7 A. I do not.

8 MS. MILLER: Object to form.

9 Q. (By Mr. Strother) Is that something that
10 you believe, as the independent director to the
11 Debtor, that you can do something to try to stop?

12 A. My understanding --

13 MS. MILLER: Object to form.

14 A. My understanding is that this claim, the
15 defect claim, has been discussed and addressed among
16 the parties -- meaning, the people who are going to
17 pay, the insurers, and the people that are going to
18 get paid, Cole Kepro, and what they're going to use
19 their money for -- on a triggering action, which was
20 part of this -- part of this whole settlement thing.

21 So my understanding is, more intelligent
22 people than me who understand the actual insurance
23 involved and -- the insurance involved in this policy,
24 the creditor, that's Fifth Third Bank, who has the
25 primary lien on Cole Kepro, all of those people have

1 smart advisors and attorneys, et cetera, who have
2 addressed this issue.

3 And it's a matter of, you know, click of the
4 right buttons. It's been addressed, it's thought
5 through. Everybody knows that we have to do this,
6 that, and the other, and that will trigger, and it
7 will go, so...

8 Q. (By Mr. Strother) That is my first
9 objection. Nonresponsive.

10 A. Okay.

11 Q. Because I think you misheard my question.
12 My question had nothing to do with the insurance claim
13 or the 9019, other than it has to do with the
14 defect -- the claim that the equipment sold by Cole
15 Kepro was defective.

16 A. Okay.

17 Q. So with that in mind, here's the question
18 I'm asking.

19 Mr. Cook represented -- testified yesterday
20 that he's had several conversations with Cash Cloud
21 employees regarding whether the equipment was
22 defective or not.

23 A. Okay.

24 Q. And my question to you is --

25 MS. MILLER: Object to form.

1 Q. (By Mr. Strother) -- as the independent
2 director for Debtor, wouldn't you agree that that's
3 something that you should try to prevent at this
4 point?

5 A. I'm not sure.

6 MS. MILLER: Object to form.

7 Q. (By Mr. Strother) Meaning, if -- currently
8 Cole Kepro is on the other side of the V regarding the
9 existence of defects from Cash Cloud, but Cole Kepro's
10 CEO is speaking directly with Cash Cloud's agents and
11 getting information that Cole Kepro believes it's
12 helpful to Cole Kepro, thereby de-valuing the asset of
13 the claims against Cole Kepro.

14 MR. MANN: Objection to form.

15 A. There's a whole bunch of assumptions in
16 there that I don't -- I don't know to be true.

17 Q. (By Mr. Strother) But shouldn't you look
18 into it?

19 A. This is all -- this is all part of this
20 deal, right? So Cole Kepro's bought the claim. What
21 do I care? I'm getting what I'm going to get. It's
22 not the value. I'm getting what I'm going to get,
23 right?

24 Q. Well, respectfully, Mr. McAlary is objecting
25 to the deal and hoping that it doesn't go through.

1 A. Understood.

2 Q. And you can't be saying that there's zero
3 percent chance that the Court is going to decide not
4 to approve this transaction, right?

5 A. Correct.

6 Q. And so I'm asking you --

7 MS. MILLER: Object to form.

8 Q. (By Mr. Strother) I'm asking if you believe
9 it would be prudent on behalf of the Debtor to try to
10 preserve the asset, which is the claim against Cole
11 Kepro, by stopping Cole Kepro's CEO from gaining
12 information that, perhaps, devalues that asset?

13 A. That's not a tough question.

14 MS. MILLER: Object to form.

15 A. I would certainly, as the Debtor and as the
16 person, the plaintiff, would not want the asset
17 devalued. But I've sold the asset, so what do I care?

18 Q. (By Mr. Strother) Again, I'm confused. Can
19 you please explain to me why you believe that you've
20 sold the asset when you have already acknowledged that
21 there's a chance that the Court does not actually
22 approve the sale?

23 A. Sure. Sure. That makes sense. Yeah, no, I
24 certainly would not want the asset devalued if the
25 Court does not approve it. But I guess I think

1 that -- so you said there's zero percent chance,
2 right, and we agreed on that. But I would say that
3 the probability is pretty high; otherwise, I would be
4 doing something.

5 But the other thing is, is he talking with
6 former Cash Cloud employees or current? Because there
7 are no current Cash Cloud employees, and I can't
8 control the former Cash Cloud employees.

9 But the premise of your question remains,
10 which is, of course, until I've got the money in my
11 pocket, I would not want the asset devalued.

12 Q. Well, I will invite your counsel to have
13 this debate offline, because I think that it's -- it
14 merits conversation, but perhaps doesn't merit
15 deposition questions. I'll move on.

16 You'd agree that the Debtor asked the
17 Court -- I'm shifting gears. You'd agree that the
18 Debtor asked the Court for approval to sell and then
19 market all of its assets including the litigation
20 claims?

21 A. Yes.

22 Q. And you would agree that the litigation
23 claims were collateral for the DIP lender.

24 MR. MANN: Objection to form.

25 A. If that's what the documents -- I would

1 leave it to the documents, whatever they say, but I
2 would expect that's the case. But I don't know.

3 Q. (By Mr. Strother) Do you know whether that
4 lender has released its lien?

5 A. I believe it has.

6 Q. Okay.

7 A. I believe the DIP lender has been paid.

8 Q. Were the litigation claims included in the
9 bid placed by Forest Road at Westcliffe?

10 A. Don't recall.

11 Q. Were they included in the Elm Creek bid?

12 A. Don't recall.

13 MS. MILLER: Object to form.

14 Q. (By Mr. Strother) Do you recall Mr. McAlary
15 bidding on the litigation at auction?

16 A. Don't recall.

17 Q. It's possible; you just don't recall?

18 A. Yes. It's possible. I don't recall.

19 Q. Do you remember what you advised Mr. McAlary
20 at the auction regarding the litigation?

21 A. I do not recall.

22 Q. If he testifies that you told him that the
23 Committee said they couldn't sell the litigation to
24 anyone because they hadn't had time to evaluate its
25 worth --

1 A. That sounds right.

2 Q. Okay.

3 A. That sounds right.

4 MS. MILLER: Objection to form.

5 Q. (By Mr. Strother) Do you know why you told
6 him that?

7 A. That's what I was told.

8 MS. MILLER: Object to form.

9 Q. (By Mr. Strother) Okay. And I structured
10 this outline a little backwards. So now I'm going to
11 ask you some questions about your background.

12 We started with you being an attorney,
13 right?

14 A. Yes.

15 Q. Okay. And I believe you've been practicing
16 for approximately 30 years?

17 A. That's right.

18 Q. Did you know Mr. McAlary before you became
19 the independent director?

20 A. Never met him.

21 Q. Did you know Ms. Axelrod?

22 A. Brett and I have known each other for a long
23 time.

24 Q. Have you worked with her in this capacity
25 before?

1 A. No. We've worked together before, but not
2 necessarily in this specific capacity. She does what
3 she does, and I do what I do, and there are places
4 where -- she does bankruptcy, and when I need a
5 bankruptcy, she's the first one I go to.

6 And I don't really do anything good for her.
7 There's nothing I do. I act as receiver, so I will
8 need bankruptcy counsel on occasion and -- you know,
9 we developed a trust and a relationship that we
10 respect each other, and so when you need somebody
11 trustworthy, she may call me, but that's really about
12 it. It's usually me.

13 Q. Is your -- let me ask a different question.

14 Did, effectively, Ms. Axelrod hire you to be
15 the independent director?

16 A. She was first person that called me. Chris
17 hired me.

18 Q. Okay.

19 A. I had to have a conversation with him, and
20 like I said, I wanted to make it very clear to him
21 that, you know, I'm not going to just pass off on
22 something if it doesn't pass -- if it doesn't pass the
23 test. And as I also said, I never concluded that
24 analysis, so we never got there. But Chris was the
25 person, but yes, it was referred by Brett, of course.

1 Q. Okay. You said Brett does bankruptcy, and
2 you do what you do. What do you do?

3 A. I -- so my practice is business transactions
4 and litigation. Basically, I function as general
5 counsel to people who don't have a line item on their
6 business for legal fees, real estate, asset purchase
7 agreements, formations, you know, business formations,
8 new ventures, capital lending -- you know, the things
9 you would need in a business, basically. The advice
10 that you might need if you owned or started or
11 operated a business or sold a business.

12 Q. Have you recently acted as a director of any
13 businesses?

14 A. I'm a director of several businesses, but
15 they're all small and my own businesses, so no. Other
16 than this one, no. I do a function as a receiver, and
17 so, it's essentially the same role, and I have three
18 ongoing receiverships right now.

19 Q. For this matter, did you have any experience
20 with crypto businesses?

21 A. No.

22 Q. Mr. Ayala, I'm getting very close to
23 wrapping it up. If I could have a five-minute break
24 and look at all my various notes, I can be pretty
25 close.

1 A. Sure, sounds good.

2 (Recess from 5:15 p.m. to 5:25 p.m.)

3 MR. STROTHER: The good news is I'm passing
4 the witness.

5 MS. MILLER: Justin, if you're passing the
6 witness, I'm going to need to take a ten-minute break.

7 MR. STROTHER: Yeah, I didn't know if I was
8 going to ask the remaining questions or not.

9 MS. MILLER: That's fine. I don't want to
10 limit myself to five. But then I'll wrap up in 10 or
11 15 minutes.

12 MR. STROTHER: Okay.

13 (Recess from 5:26 p.m. to 5:41 p.m.)

14 EXAMINATION

15 BY MS. MILLER:

16 Q. Good afternoon, Mr. Ayala. Laura Miller for
17 the Official Committee of Unsecured Creditors here.
18 Hello. I just have a few questions for you. So I
19 will also jump around a little bit, so if you don't
20 understand a question, just let me know.

21 We've talked a little bit today about
22 testimony by Fred Cook. I know Mr. Strother referred
23 to him as Paul Cook. I will represent his name is
24 Fred Cook.

25 Are you aware -- and you were asked a couple

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1 questions about his deposition testimony. Do you
2 recall that?

3 A. I recall being asked questions.

4 Q. Are you aware that in his deposition
5 testimony he testified -- Mr. Cook testified that he
6 recused himself from any Committee consideration of
7 matters related to the sale or settlement of the CKI
8 litigation?

9 A. I was not aware.

10 Q. Aside from Mr. Strother's representations to
11 you about Mr. Cook's testimony today, do you have any
12 information suggesting that CKI's financial situation
13 has changed since the 9019 motion was filed?

14 A. I don't have any information about Cole
15 Kepro's financial situation.

16 Q. Well, you testified earlier that you were
17 made aware of certain financial information prior to
18 the time that you filed your Declaration, correct?

19 A. I was told it was postured -- it was lawyer
20 talk. It was postured that Cole Kepro would go
21 bankrupt. I didn't receive any documents, see any
22 financial information, any financial statements,
23 anything like that. It was posturing. So that's all
24 I have for you.

25 Q. You testified earlier that you spoke with

1 Mr. McAlary about the sale of the estate litigation.

2 Do you recall that?

3 A. The sale of the estate litigation?

4 Q. Well, and maybe -- maybe I misunderstood
5 your testimony. But I understood you to testify
6 earlier that you and Mr. McAlary had conversation
7 about his offer to purchase the estate litigation; is
8 that right?

9 A. Yes, yes. We did have conversations.

10 Q. When were those?

11 A. You know what? I can't pinpoint them for
12 you. But I can orient you to a time frame when there
13 was an effort ongoing to sell the litigation. And so
14 there was back and forth. There were conversations
15 among folks who were interested in that litigation,
16 and Chris happened to be one of those people, and he
17 and I did have conversations about -- I mean, I had
18 individual conversations with him about clarifying his
19 offer and making it, as best he could, making it match
20 the offer to Cole Kepro.

21 In other words, let's just put it this way.
22 What I was trying to do was facilitate a -- I was
23 trying to facilitate a situation where we could match
24 offers, right? Where the McAlary offer matched the
25 creditors committee offer and the Cole Kepro offer in

1 the relevant aspects, right? That they would -- we
2 could evaluate them. That was the point. That was
3 the point of the conversation with Chris, was to say
4 to him, These are the things you need to clarify and
5 whatnot.

6 Q. So this would have been sometime in the
7 summer of --

8 A. Yes.

9 Q. -- 2023; is that right?

10 A. Yes.

11 Q. Was counsel present during any of these
12 conversations?

13 A. On occasion and on occasion, no. Sometimes
14 counsel was -- sometimes I talked to Chris directly.
15 I mean, we talked a lot. I mean, especially early on
16 in my engagement, trying to understand the business,
17 understand what he was doing, understand, you know,
18 this bankruptcy scenario.

19 And my focus was on, early on, the
20 transactions he had engaged in, right? So that's what
21 I was talking about with him was the transactions he
22 engaged in with the company. And then we went to the
23 auction, and so that -- you know, the conversations
24 expanded, or my role expanded, I guess, interest
25 expanded, so...

1 Q. So you referenced just now having
2 conversations with Mr. McAlary regarding internal
3 transactions. Do I understand you correctly?

4 A. Yes.

5 Q. And this was while Mr. McAlary was still a
6 director and CEO of Cash Cloud, correct?

7 A. Yes. I think I covered it before, but let
8 me just be clear. I was one of -- the main reason I
9 was hired was to review McAlary's internal
10 transactions and assess, whether they were
11 appropriate, whether they passed legal and ethical
12 hurdles.

13 And before I -- and so I received documents
14 from Chris. Of course, I spoke with him, and I never
15 concluded that process. Because fairly quickly, he --
16 the auction happened. He resigned shortly thereafter.
17 I became the independent director and was doing that,
18 and so his transactions were not my focus, and I
19 didn't draw any conclusions.

20 Q. So I want to unpack that a little bit. When
21 you say "internal transactions," what transactions
22 specifically are you referencing?

23 MS. STROTHER: I'm going to object at the
24 moment for the following reason: There is outstanding
25 litigation brought by the Committee against

1 Mr. McAlary regarding, potentially, the transactions
2 that you're trying to ask about, and it's
3 inappropriate to use this deposition as an early
4 entree into discovering something that's going to help
5 bolster the Committee's case.

6 I can't instruct him not to answer, but --
7 and I can't instruct you not to ask, but I can say I
8 think this is far outside the scope of what's relevant
9 in the 9019 proceeding.

10 MS. MILLER: And my position is the door was
11 cracked wide open in your questioning, and I'd like to
12 ask a few questions about this.

13 THE DEPONENT: Well, go right ahead.

14 MS. MILLER: Could I ask the court reporter
15 to read me question back?

16 (Requested portion of record was read.)

17 A. So I received a set of documents from -- and
18 I don't remember who I received it from, whether it
19 was from Brett or from Chris directly; I don't recall.

20 The transactions were related to tax
21 reimbursements, if I recall correctly. And there
22 might have been other transactions. I mean, there
23 were -- there were other transactions in there. So
24 there was a series of transactions -- and, again, what
25 I would say to you is that I told Chris at the

1 beginning, I don't know, you know, if I'm going to be
2 able to pass on these things and bless them.

3 And after I looked at some of the documents
4 and transactions, I had questions that I was going to
5 have to ask him, and I had concerns. But I also --
6 you know, the concerns were really about just
7 buttoning up things, because the documents I reviewed,
8 you know, were all properly done and so, you know, you
9 had to ask yourself -- you had to go deeper, that's
10 all. You had to go deeper.

11 And so I never got to that point because he
12 removed himself from the board. The auction -- the
13 auction happened and, you know, we're in the
14 liquidation process so it didn't matter until, as
15 we've discussed today, you know, the creditors
16 committee and the other folks decided that --

17 Q. Did Mr. McAlary -- I apologize. I didn't
18 realize you were not finished yet.

19 A. You go.

20 Q. I'm going to do my best not to interrupt
21 you.

22 Did Mr. McAlary -- you mentioned the phrases
23 "pass on these things" and "bless them." Did
24 Mr. McAlary ask you to bless these transactions in
25 some fashion?

1 A. No, he didn't. I told him I was not sure I
2 could go through -- so I am a lawyer. I am on the
3 board of a bank. You know, have various positions of
4 responsibility, and my credibility is important, and
5 so that was what was on the line for me.

6 And I told Chris and Chris said, Hey, look
7 at everything. It's wide open, I'll give you every
8 answer you want, I'll give you everything -- anything
9 you need, just tell me what you want, and I will, you
10 know, I'll answer your questions.

11 So I didn't know. I mean, he never -- this
12 was not -- again, I do not feel good about taking
13 people's money when I'm supposed to do something for
14 them and I'm not going to do it for them. And so I
15 was concerned about that with Chris, and I told him,
16 Hey, I'm not going to -- like I said, he never asked
17 me to bless anything, and I told him, I don't know if
18 I'm going to be able to bless anything.

19 And his answer was, Hey, go -- tell me what
20 you need, give me everything you want, I'll give you
21 the information, I'll do it, and I want to hire you.
22 And I just never got to it.

23 Q. Have you ever discussed any other aspects of
24 the derivative claims against Mr. McAlary with
25 Mr. McAlary?

1 A. You know, no. Nothing other than I couldn't
2 understand it. There were -- I mean, I sensed all
3 over the place that folks were unhappy with him, you
4 know, and I couldn't understand it because he was very
5 cooperative with me. He was very forthcoming. If I
6 asked for a document or a piece of information or if I
7 asked for something, I got it.

8 So I, you know, didn't understand it, and
9 still -- still don't. Again, don't know what's right
10 or wrong on the topic.

11 Q. Let's take a look at one of the exhibits
12 that you were shown earlier. I'd like to you to pull
13 up Exhibit 10, if you don't mind. Just let me know
14 when you're there.

15 A. All right. We're set.

16 Q. All right. Great. So you looked at this
17 document earlier, correct?

18 A. Yes.

19 Q. And this is an August 21st, 2023, email from
20 Dawn Cica; is that right?

21 A. Yes.

22 Q. And Ms. Cica is Mr. McAlary's attorney,
23 correct?

24 A. Yes.

25 Q. And she writes, "Brett, attached please find

1 an updated offer by CC BR Holdco, LLC, to purchase the
2 estate's claims against Cole Kepro for \$1 million and
3 the estate's claims against Bitaccess and BitCoin Depot
4 for \$200,000 as well as the payment of the arbitration
5 deposit in Canada of Canadian dollars in the amount of
6 \$261,389,14." Do you see that?

7 A. Yes.

8 Q. So you would agree that this is a global
9 offer by Mr. McAlary to purchase all of the estate's
10 litigation, not just the Cole Kepro, correct?

11 MS. STROTHER: Objection. Form.

12 A. It says what it says. The document speaks
13 for itself. So I'm not going to -- I'm not going to
14 comment any further than what the document says.

15 Q. (By Ms. Miller) Okay. There's an asset --
16 a proposed asset purchase agreement attached to this
17 email, correct?

18 A. Yes.

19 Q. Is there anything in that APA that indicates
20 that the Cole Kepro portion of this offer is a
21 stand-alone offer?

22 A. I don't know. I mean, I'm not going to read
23 the whole thing. If you want to point to a particular
24 provision, then I'm happy to look at it. But other
25 than that, I will accept your representation as a --

1 as a legal authority --

2 Q. Okay.

3 A. -- as to what it says.

4 Q. We can move on. Let's take a look at
5 Exhibit 11.

6 A. Okay.

7 Q. And you were shown this exhibit earlier in
8 your deposition as well, correct?

9 A. Yes.

10 Q. And this is a letter sent by Dawn Cica as
11 well?

12 A. Yes.

13 Q. And this was sent just yesterday, correct?

14 A. Yes.

15 Q. So this letter was sent several months after
16 the negotiations concerning the CKI litigation; is
17 that correct?

18 MS. STROTHER: Objection. Form.

19 A. It was sent when it was sent. The date's on
20 there.

21 Q. (By Ms. Miller) Okay. Ms. Cica writes in
22 her last line -- or sorry -- the last line of the
23 first paragraph: "At the request of the Debtor, such
24 an offer was made with the warrant that the purchaser
25 would purchase the claims against Cole Kepro even if

1 Cole Kepro filed a bankruptcy petition." Do you see
2 that?

3 A. I do.

4 Q. Setting aside this letter, are you aware of
5 any such warrant being made by Mr. McAlary at any
6 time?

7 A. All right. I just reread the sentence, and
8 I'm sorry, Linda. I apologize if I'm making your job
9 harder, but I just didn't understand the question.

10 Q. Sure. So in this letter Ms. Cica is
11 representing that an offer was made by Mr. McAlary
12 with a warrant that Mr. McAlary would purchase the
13 Cole Kepro claims even if Cole Kepro filed for
14 bankruptcy. Is that a fair summary of that last line?

15 A. I mean, it says what it says, right? It
16 says it right there. All right. So we're on the same
17 page. That's what it says.

18 Q. I agree with that. Separate from this
19 letter, independent of this letter, do you have an
20 independent recollection of any warrant being made by
21 Mr. McAlary that he would purchase the Cole Kepro
22 claims even if Cole Kepro filed for bankruptcy,
23 separate and apart from this letter?

24 A. No. I've had no conversations with Chris
25 McAlary about that warrant, other than what's said in

1 this letter.

2 MS. MILLER: Okay. I have no further
3 questions.

4 MR. MANN: I'm trying think if I would want
5 to -- but to be honest, I think we're good.

6 MS. STROTHER: And we reserve our further
7 questions.

8 THE COURT REPORTER: Is the witness going to
9 read and sign?

10 THE DEPONENT: No. We're going to send it
11 to counsel and accept it. As long as you're good with
12 that. I'm doing lawyer stuff.

13 THE COURT REPORTER: Do you want a copy?

14 MR. STROTHER: Yeah, I'm the main one, so
15 whatever our order is.

16 THE COURT REPORTER: Mr Mann, do you want a
17 copy?

18 MR. MANN: Yeah, we'll need one.

19 THE COURT REPORTER: Thank you.

20 (Deposition concluded at 6:01 p.m.)

21

22

23

24

25

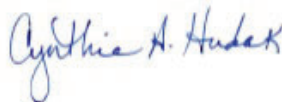
1 BE IT KNOWN that the foregoing proceedings
2 were taken before me; that the witness before
3 testifying was duly sworn to the whole truth; that the
4 foregoing pages are a full, true, and accurate record
5 of the proceedings, all done to the best of my skill
6 and ability; that the proceedings were taken down by
7 me in stenographic shorthand and thereafter reduced to
8 print under my direction.

9 I CERTIFY that I am in no way related to any
10 of the parties hereto, nor am I in any way interested
11 in the outcome thereof.
12
13
14

15 () Review and signature was requested.

16 (X) Review and signature was waived.

17 () Review and signature was not requested.
18
19
20



21 Cynthia A. Hudak, RPR

22 Nevada Certified Reporter, #987
23
24
25

1 In Re: Cash Cloud, Inc., D/B/A Coin Cloud v.
2 Daniel Ayala (#6291030)

3 E R R A T A S H E E T

4 PAGE_____ LINE_____ CHANGE_____

5 _____
6 REASON_____

7 PAGE_____ LINE_____ CHANGE_____

8 _____
9 REASON_____

10 PAGE_____ LINE_____ CHANGE_____

11 _____
12 REASON_____

13 PAGE_____ LINE_____ CHANGE_____

14 _____
15 REASON_____

16 PAGE_____ LINE_____ CHANGE_____

17 _____
18 REASON_____

19 PAGE_____ LINE_____ CHANGE_____

20 _____
21 REASON_____

22 _____
23 _____
24 Daniel Ayala Date

1 In Re: Cash Cloud, Inc., D/B/A Coin Cloud v.

2 Daniel Ayala (#6291030)

3 ACKNOWLEDGEMENT OF DEPONENT

4 I, Daniel Ayala, do hereby declare that I
5 have read the foregoing transcript, I have made any
6 corrections, additions, or changes I deemed necessary as
7 noted above to be appended hereto, and that the same is
8 a true, correct and complete transcript of the testimony
9 given by me.

10
11 _____
12 Daniel Ayala

_____ Date

13 *If notary is required

14 SUBSCRIBED AND SWORN TO BEFORE ME THIS
15 _____ DAY OF _____, 20____.

16
17
18 _____
19 NOTARY PUBLIC

[& - 702]

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS

COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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